No. 82-940

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ELIZABETH ANDERSON HISHON,
Petitioner,

v.

KING & SPALDING,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

1. Whether law partners organized for advocacy are entitled to constitutionally protected freedom of association.

2. Whether Congress intended, through Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, to give the Equal Employment Opportunity Commission (EEOC), a politically appointed advocacy agency engaged in litigation, jurisdiction over invitations to join law firm partnerships.

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BRIEF FOR RESPONDENT

CONSTITUTIONAL PROVISION

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. I.

STATEMENT OF THE CASE

Respondent King & Spalding, a law partnership, voted on May 26, 1978, not to invite Petitioner, an associate of the firm, to become a partner. Joint Appendix at 56 (J.A.).

On November 19, 1979, 542 days later, Petitioner filed a charge of sex discrimination with the Equal Employment Opportunity Commission (EEOC) against King & Spalding and each partner individually, terming them "employers." J.A. 18, 56. Ten days later, the EEOC issued Petitioner a Notice of Right to Sue. J.A. 24-25.

The Complaint was filed on February 27, 1980. J.A. 1. Count one alleged sex discrimination with respect to "compensation, terms, conditions and privileges of employment and employment opportunities" in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* J.A. 7.[1] Specifically, the Complaint alleged that associates whose work was "satisfactory" were "made partners as a matter of course." J.A. 9. Yet,

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[1] Counts two and three, alleging violations of the Equal Pay Act of 1963, 29 U.S.C. § 206(d)(1), and breach of contract, were dismissed without prejudice. *Hishon v. King & Spalding*, 678 F.2d 1022, 1025 n.5 (11th Cir. 1982). Regarding equal pay, Petitioner's "compensation . . . exceeded the highest compensation paid by King & Spalding to any other associate." J.A. 55.

"[d]efendant failed and refused to offer plaintiff a promotion to partnership." J.A. 12.[2]

The Complaint, which alleged that "[d]efendant discharged plaintiff as its employee," J.A. 12, did not mention an up-or-out policy.[3] Petitioner first referred to it in a brief filed on June 23, 1980. J.A. 165. In a letter to the district court, this brief was cited as the source of Petitioner's claims regarding the policy.[4]

In its Answer, King & Spalding stated that Petitioner's "claims under Title VII . . . are barred because an invitation to partnership is not an employment practice . . . subject to Title VII." J.A. 27, 29.

King & Spalding also stated that associates are not invited to become partners " 'as a matter of course' " or with "only 'satisfactory' evaluations." J.A. 31. Petitioner was rated "good" but neither "very good" nor "outstanding" during the first two years and was told during the next two years "that she was in a middle category." In the fourth year, Petitioner was advised "that she needed to develop a more practical approach to clients' problems"; in the fifth year, she was told that she would

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[2] Petitioner "elected to refrain from litigating . . . [allegations of] individual instances [of discrimination]." *Hishon v. King & Spalding*, 678 F.2d 1022, 1029 n.13 (11th Cir. 1982). Petitioner "does not desire a remand . . . to afford . . . an opportunity to try any other Title VII claims based on individual episodes of sex discrimination." *Id.* at 1025 n.4.

[3] The Eleventh Circuit considered the up-or-out policy to be a jurisdictional basis. *Hishon v. King & Spalding*, 678 F.2d 1022, 1026 (11th Cir. 1982).

[4] Letter from Emmet J. Bondurant, II, to Hon. Newell Edenfield (Nov. 18, 1980). This letter, referenced in the decision of the district court, *Hishon v. King & Spalding*, 24 Fair Empl.Prac.Cas. (BNA) 1303, 1305 n.1 (N.D.Ga. 1980), is contained in the district court file, but is not in the Joint Appendix or Record. "Courts are particularly apt to take notice of material in court files." 1 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 201[03], at 201-29 (1982); *see, e.g., Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 156-57 (1969) (Court's own records); *Wells v. United States*, 318 U.S. 257, 260 (1943) (records of another court).

"probably not" be invited to become a partner; in the sixth year, she was told that she had not been invited to become a partner; and in the seventh year, she was told that the firm had voted not to reconsider its previous decision. J.A. 32, 33, 34.

At King & Spalding, a number of lawyers, "by virtue of their experience and achievements at the bar, have been invited to partnership directly." J.A. 45. However, "most of the lawyers considered for partnership are considered . . . after working at the firm as an associate for a number of years."[5]

On March 31, 1980, King & Spalding filed a motion to dismiss, contending, among other things, that Petitioner's charge was untimely filed and that an invitation to join a law partnership is not covered by Title VII. J.A. 41-42. That day, King & Spalding also filed a notice to take Petitioner's deposition to ascertain "whether plaintiff has properly invoked the jurisdiction of this Court by timely filing a charge of discrimination with the Equal Employment Opportunty Commission within 180 days of any alleged act of discrimination by defendant." J.A. 79.

Also on March 31, 1980, counsel for the Petitioner wrote to the district court seeking a deferral of "discovery on other issues until the threshold issues have been resolved." J.A. 80-81. The letter stated:

> [W]e recognize that discovery in this case is likely to involve some of the most private and sensitive decisions that a law firm makes . . . .
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> I don't want to be forced to explore these sensitive issues by discovery unless it becomes necessary to do so in the course of the litigation—nor do I want

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[5] [T]he lawyer . . . is evaluated by . . . inquiry into . . . the lawyer's technical skill, leadership, ability to attract and handle a client's work in an outstanding manner, ability to deal with other lawyers both within and without the firm, and a general compatibility with the lawyers in the partnership.

J.A. 45.

> King & Spalding to feel that discovery into their private affairs is being used as any kind of lever to coerce the firm to settle a claim which it believes to be without merit.
>
> For these reasons, I want to take the unusual step of proposing procedures . . . justified by the nature of the parties and the issues.

J.A. 81-82.

After setting forth Petitioner's view of the threshold issues, the letter continued:

> I recognize that any law firm would be reluctant to disclose matters relating to the profitability and the method of determining the amount and trends of partnership income to other lawyers even under a protective order.
>
> So that no one will feel that we are attempting to take unfair advantage of this fact in order to put pressure on the defendant, we would propose that the Court . . . stay discovery as to damages until liability has first been determined in favor of the plaintiff.
>
> . . . .
>
> It is inevitable that many of the facts that are likely to be disclosed during merits discovery may, potentially at least, be embarrassing to many fine lawyers who were formerly or are presently practicing with King & Spalding. To avoid unnecessarily embarrassing any of these members of the Bar, I believe that the Court should enter a comprehensive protective order placing all answers to interrogatories by either side, the depositions and documents (and perhaps even briefs and transcripts of any hearings) under seal. The Court may also want to consider holding all hearings *in camera*.
>
> In short, we are prepared to agree to any reasonable protective order, so that the case can be litigated fully and fairly, without any party being under any pressure to avoid publicity or public embarrassment.

J.A. 83-84.

Petitioner sought no depositions, relying instead on requests for production of documents and interrogatories which included the following:

> 3.(e) Please identify all documents received by defendants from clients . . . that refer to or comment upon the quality of plaintiff's work as a lawyer, her personal attributes, her progress toward or eligibility for partnership, or her relative merits in comparison with other associates.
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> . . . .
>
> 4. If you contend that defendant's decision . . . was based on any specific errors, omissions or deficiencies in plaintiff's performance . . . in representing or on behalf of any clients of defendant, please identify each such matter by stating:
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> (1) the name of the client;
>
> (2) the name of the matter;
>
> (3) the file or other identifying number of the matter; and
>
> (4) describe the specific error, omission or other difficulty in plaintiff's performance; and
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> (5) identify (A) the persons whom defendant contends have personal knowledge of the facts . . . in connection with a specific matter or client, and (B) the documents that defendant contends refer to, reflect or evidence any error, omission or deficiency in plaintiff's performance.

J.A. 97, 99-100.

Interrogatories 3(e) and 4 were not answered and Petitioner's deposition was not taken because the district court limited discovery to whether "Title VII . . . appl[ies] to the decisions of defendant with respect to the plaintiff." J.A. 86-87.[6] Internal memoranda setting forth the law firm's organization were provided.

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[6] Four and one-half months were allowed for discovery. J.A. 86; Record at 261.

J.A. 115-23. A complete copy of King & Spalding's partnership agreement also was produced. J.A. 153-64. The only matters excised from it were the "participating units" of ownership of the individual partners. J.A. 155-56. A copy without those deletions was provided to the district court *in camera*. J.A. 237.

The EEOC moved to participate as amicus curiae, J.A. 109, and later sought "access to information regarding King & Spalding's structure and operations." J.A. 150; *see* J.A. 252-53.

The court granted the EEOC's motion to participate as amicus curiae but denied it access to discovery. J.A. 218-19.

On November 26, 1980, a judgment was entered dismissing the Complaint. J.A. 259.

On appeal, the EEOC again unsuccessfully sought access to the record, filed a brief as amicus curiae, and participated in oral argument. J.A. 5.

The Eleventh Circuit affirmed the dismissal, holding that "Title VII does not apply to those decisions dealing with the formation of partnerships." *Hishon v. King & Spalding*, 678 F.2d 1022, 1030 (11th Cir. 1982).

SUMMARY OF ARGUMENT

Lawyers are advocates, essential to the system of justice. They are provided the highest degree of associational freedom. To defend the rights of American citizens, lawyers must be free from private and governmental pressures, including the pressure to accept unacceptable lawyers as partners. Although not above the law, "lawyers do differ from other callings. 'This is not a fancied conceit, but a cherished tradition . . . .'" *Bates v. State Bar*, 433 U.S. 350, 401 n.11 (1977) (Powell, J., concurring in part and dissenting in part) (quoting H. Drinker, Legal Ethics 211 (1963)).

To the Petitioner, cherished traditions are antiquated, and law partnerships are big business—in effect, corporations. Thus, Petitioner and the EEOC, a politically appointed advocacy agency of the Government, seek Title VII coverage of invitations to join law partnerships.

The application of Title VII to the election of law partners would inject the EEOC into decisions regarding the ownership and internal structure of law firms. For law firms, this would create the appearance of a conflict between defense of their clients and defense of their firms because the EEOC is a party-plaintiff in actions against the clients of law firms. Additionally, discovery would destroy the confidentiality inherent in the attorney-client relationship. These concerns, the familiarity of Congress with law partnerships, and the inevitability of remedial problems demonstrate the unlikelihood that Congress intended that Title VII apply. This is especially true because the central characteristic of partnerships in all fifty states is *voluntary* association.

In fact, law partners were regarded as "so clearly outside the Act that no specific exclusionary provision was thought necessary." *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 283 (1974) (discussing exclusion of managers from the National Labor Relations Act (NLRA)).

This was the EEOC's position immediately after Title VII became law. In a series of General Counsel opinions, reporting instructions to employers, and Commission decisions, the agency repeatedly found partners were not employees within the meaning of the Act.

"Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." *Lorillard v. Pons*, 434 U.S. 575, 580 (1978). In 1972, Congress reexamined Title VII, but did not amend it to include law partners or partnership decisions.

Because partnership in a law firm is not employment, an invitation to partnership is neither an *"employment* opportunit[y]" nor a term, condition, or privilege "of *employment*." 42 U.S.C. § 2000e-2(a)(1), (2) (emphasis added).[7]

Although Petitioner stresses the beneficent purposes of Title VII, "[e]xperience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding." *Olmstead v. United States*, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting), *overruled*, *Katz v. United States*, 389 U.S. 347 (1967).

Petitioner's case rests on inaccurate stereotypes, incorrectly assumes that discrimination against women lawyers is widespread, and ignores the competition among large law firms for top legal talent and the encouragement women lawyers have received from an independent bar. More than a decade ago, the American Bar Association (ABA) "strongly condemn[ed] all forms of discriminatory hiring practices within the legal profession, whether on the basis of sex, religion, race, or national origin." ABA, Reports of the American Bar Association 154 (1972).

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[7] Petitioner's third "theory," that termination under King & Spalding's up-or-out rule is itself actionable, is precluded by this Court's decision in *Delaware State College v. Ricks*, 449 U.S. 250 (1980). *Ricks* holds that it is the denial of tenure and not the "delayed, but inevitable, consequence of the denial of tenure" that is the unlawful act. *Id.* at 257-58; *accord Chardon v. Fernandez*, 454 U.S. 6, 8 (1981).

Apart from this failure of Petitioner's "test case," Petitioner's Brief at 23, Petitioner's charge was filed on November 19, 1979, 542 days after King & Spalding decided in May 1978 not to invite Petitioner to become a partner. J.A. 56. Thus, Petitioner's suit is time-barred. 42 U.S.C. § 2000e-5(e).

There is no grant of authority to law firms to discriminate. If law partnerships refuse to live up to their agreements with their associates, purely private actions such as breach of contract are available.[8] The Reconstruction Acts, 42 U.S.C. §§ 1981 and 1982, appear to provide black associates an adequate remedy that involves no direct participation by any agency of the Executive Branch.

Since this Court's decisions in *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), and *Bates v. State Bar*, 433 U.S. 350, commercialization and bureaucratization have rapidly taken hold of the practice of law, resulting in a loss of idealism in the profession. A decision for Petitioner and the EEOC would accelerate this trend and "force the Bar to become a group of thoroughly orthodox, time-serving, government-fearing individuals." *In re Anastaplo*, 366 U.S. 82, 115-16 (1961) (Black, J., dissenting).

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[8] *Hishon v. King & Spalding*, 678 F.2d at 1029.

ARGUMENT

I. THE ASSOCIATIONAL FREEDOM OF ADVOCATES MUST BE CONSIDERED WHEN DECIDING WHETHER CONGRESS INTENDED TO ALLOW THE EEOC TO REVIEW INVITATIONS TO PARTNERSHIP

Law firms, like law schools, are made up of "those qualities which are incapable of objective measurement," including "reputation . . . , experience . . . , position and influence . . . , standing . . . , traditions and prestige." *Sweatt v. Painter*, 339 U.S. 629, 634 (1950). They are totally dependent upon "quality and character." *McKissick v. Carmichael*, 187 F.2d 949, 952 (4th Cir.), *cert. denied*, 341 U.S. 951 (1951).

"[A]lthough the law is a highly learned profession, . . . it is an intensely practical one." *Sweatt v. Painter*, 339 U.S. at 634. It is highly competitive. "Moreover, it is of specific value that [law] students form acquaintances with the persons who will later occupy positions of influence and power in the profession and in the public life of the state." *McKissick v. Carmichael*, 187 F.2d at 952. Not even legal education can "be effective in isolation from the individuals and institutions with which the law interacts." *Sweatt v. Painter*, 339 U.S. at 634. Association with those who are "lawyers, . . . judges and other officials" with whom "one must deal in practice is essential to legal education." *Id.* "To know and to be known by the dominant figures of the commonwealth facilitates private as well as public business . . . ." *McKissick v. Carmichael*, 187 F.2d at 952.

The law treats lawyers separately because they are "entrusted with a client's confidences, aspirations, freedom, life itself, property and the very means of livelihood." *Baird v. State Bar*, 401 U.S. 1, 20 (1971). "As a profession, lawyers do differ from other callings. 'This is not a fancied conceit, but a cherished tradition, the

preservation of which is essential to the lawyer's reverence for his calling.'" *Bates v. State Bar*, 433 U.S. at 401 n.11 (Powell, J., concurring in part and dissenting in part) (quoting H. Drinker, Legal Ethics 211 (1963)).

Petitioner and amici curiae have a different emphasis. They stress "economic realities" as they attack King & Spalding and other large law firms. They see them as "centers of economic and political power." Petitioner's Brief at 16. Inadvertently stressing first amendment freedom, Petitioner cites "King & Spalding's well-publicized connections during the Carter Administration [which] were typical of the influence wielded in Washington, and in state capitals throughout the Nation, by many other large institutional law firms." *Id.* at 16-17.[9]

To Petitioner, law firms are "Big Business," *id.* at 15,[10] "'large, impersonal, and highly structured enter-

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[9] Petitioner seems to believe that no judge of the Eleventh Circuit voted for rehearing *en banc* because they "may have disqualified themselves," due to a personal or political relationship with King & Spalding partners Griffin B. Bell and Charles H. Kirbo. Petition for a Writ of Certiorari at 10 n.5 (Dec. 3, 1982). Under that standard, three aditional members of this Court would have recused themselves in *United States v. Nixon*, 418 U.S. 683 (1974), and 40 of the 51 women who serve as federal judges (78%) and 38 of the 52 black federal judges (73%) would have to recuse themselves whenever former Attorney General Bell's and Mr. Kirbo's firm comes to court. Cohodas, *Reagan's Judicial Selections Draw Differing Assessments*, 41 Cong. Q. Weekly Rep. (Jan. 15, 1983); information supplied by the Administrative Office of the United States Courts, compiled from Department of Justice information.

[10] Amici agree. *See, e.g.*, Brief Amicus Curiae of the Women's Bar Associations of Illinois and New York at 17 (May 11, 1983) (Illinois and New York Women's Brief) ("[T]he . . . largest are multimillion dollar commercial enterprises."); Motion for Leave to File and Brief of Robert Abrams, *et al.*, at 21 (May 9, 1983) (Abrams Brief) ("Larger business organizations—including partnerships—cannot, therefore, rely on associational claims to avoid the statutory proscriptions against discrimination."); *id.* at 32 (em-

prise[s],'" *id.* at 33, and "historic bastions of overt discrimination in the employment of women, Jews, blacks and other minorities." *Id.* at 19 n.9 (citation omitted). Law practice is "'work' or a 'job,'" *id.* at 28, so that "[p]artnership in a law firm is primarily a job opportunity . . . readily distinguishable from real estate and other investment partnerships," *id.* at 32, because the income is derived from personal services rather than capital.[11]

To King & Spalding, however, the right of law partners to choose those with whom they will share ownership, responsibility, duty, "reputation . . . , experience . . . , position and influence . . . , standing . . . , traditions and prestige," *Sweatt v. Painter*, 339 U.S. at 634, for a lifetime of law practice is of deeper significance.[12] The selection of law partners without governmental intrusion is essential to lawyer advocacy. The Government, in the form of the EEOC, is an advocate with charging,

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phasis in original) ("[I]t is a *commercial enterprise*—a law firm—whose associational interests are at stake."); *id.* at 36 ("Law firms are businesses."); *see also* Brief *Amicus Curiae* for American Association of University Women, *et al.*, at 51-52 (May 12, 1983) (AAUW Brief); Brief of Women's Bar Association of Massachusetts as Amicus Curiae at 20 (May 10, 1983) (Massachusetts Women's Brief); Brief *Amici Curiae* of the Anti-Defamation League of B'nai B'rith and the American Jewish Congress in Support of Petitioner at 14 (May 12, 1983) (ADL Brief); Brief *Amici Curiae* for California Women Lawyers, *et al.* at 20 (May 12, 1983) (California Women's Brief); Brief of the American Civil Liberties Union as *Amicus Curiae* in Support of Petitioner at 40-41 (May 10, 1983) (ACLU Brief); Brief for the United States and the Equal Employment Opportunity Commission as Amici Curiae Supporting Reversal at 15 n.6 (May 1983) (EEOC Brief).

[11] If profit is the dominant motive of male partners, as Petitioner suggests, it logically follows that decisions as to who should be invited to become partners will be based upon monetary considerations rather than sex or other personal values.

[12] *Branti v. Finkel*, 445 U.S. 507, 521 (1980) (Stewart, J., dissenting) (One "can think of few occupational relationships more instinct with the necessity of mutual confidence and trust than [the] professional association" of a "firm of lawyers.").

investigative, and litigative duties. If Title VII is applied to the partnership decision, the EEOC's discharge of its statutorily-imposed duties will improperly intrude on law firms' freedom of association, which is protected by the Constitution of the United States,[13] and will strike at the very hand that holds the shield against the Executive Branch of Government.[14]

Petitioner asserts that "[t]he professional duties of a lawyer in a large firm are essentially the same whether the lawyer is a 'partner' or an 'associate.' In either case, the lawyer earns a livelihood by performing professional services for clients of the firm." Petitioner's Brief at 13. Consistent with this theory, Petitioner could have added that the duties of judges and law clerks "are essentially the same" for each performs "professional services."

It is the members of law partnerships, however, who are charged with ultimate responsibility, ultimate liability, and ultimate duty. Partners teach young lawyers. They engage in daily reviews of an associate's work.[15]

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[13] "It is well settled that this Court will not pass on the constitutionality of an Act of Congress if a construction of the statute is fairly possible by which the question may be avoided." *United States v. Clark*, 445 U.S. 23, 27 (1980); *NLRB v. Catholic Bishop*, 440 U.S. 490, 506-07 (1979) (Court refused to extend the NLRB's jurisdiction to include teachers in church-operated schools "in the absence of a clear expression of Congress' intent" because such a construction "could in turn call upon the Court to resolve difficult and sensitive questions arising out of the guarantees of the First Amendment Religion Clauses." The Court's conclusion was fortified by "[t]he absence of an 'affirmative intention of the Congress clearly expressed.'").

[14] "It is a fair characterization of the lawyer's responsibility in our society that he stands 'as a shield,' . . . in defense of right and to ward off wrong." *Schware v. Board of Bar Examiners*, 353 U.S. 232, 247 (1957) (Frankfurter, J., concurring).

[15] *See* Schwartz, *The Reorganization of the Legal Profession*, 58 Tex.L.Rev. 1269, 1283, 1284 (1980) ("one of [the large law firm's] important characteristics is the exposure of each lawyer's performance to other firm lawyers . . . . The large firm lawyer has a definite peer group—the firm itself. The ethical behavior of that lawyer,

Partners have wider knowledge of the client's affairs and fashion legal approaches to fit the client's overall needs. Unlike a partner, an associate "does not violate the rules of professional conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional liability." Model Rules of Professional Conduct Rule 5.2(b) (Proposed Final Draft 1981). As an amicus curiae brief explains, " 'Supervision limits [the associate's] personal responsibility and individual authority.' . . . '[A]n associate [is in] an apprenticeship.' " California Women's Brief at 7 (citations omitted).

A. Even Non-Lawyer Partnerships That Are Purely Commercial Have a Constitutionally Protected Right of Association

The first amendment's protection of free expression extends to commercial speech.[16] Similarly, the right of commercial association is entitled to protection.

> The idea is not sound . . . that the First Amendment's safeguards are wholly inapplicable to business or economic activity. And it does not resolve where the lines shall be drawn in a particular case merely to urge . . . that an organization for which the rights of free speech and free assembly are claimed is one "engaged in business activities" or that the individual who leads it in exercising their rights receives compensation for doing so. Nor, on the other hand, is the answer given . . . by ignoring the organization's economic function . . . .

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like his competence, receives review by those above him or her in the hierarchy, without breach of client confidence."); C. Epstein, Women in Law 14 (1983) ("Monitoring of the professions is accomplished by peer review and control, with emphasis on informal as well as formal rules and constraints.").

[16] *See, e.g., Bolger v. Youngs Drug Products Corp.*, 51 U.S.L.W. 4961 (U.S. June 24, 1983); *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980); *Bates v. State Bar*, 433 U.S. 350; *Linmark Associates, Inc. v. Willingboro*, 431 U.S. 85 (1977); *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Counsel, Inc.*, 425 U.S. 748 (1976).

> These comparisons are at once too simple, too general, and too inaccurate to be determinative.

Thomas v. Collins, 323 U.S. 516, 531 (1945).[17]

Recently, in *United Brotherhood of Carpenters, Local 610 v. Scott*, 51 U.S.L.W. 5173, 5175 (U.S. July 5, 1983), this Court wrote of the right to associate for economic purposes as having "its source in the First Amendment." The court of appeals had specifically rejected the contention that there was no such right. *Scott v. Moore*, 680 F.2d 979, 990 (5th Cir. 1982) (*en banc*), *rev'd on other grounds sub nom. United Brotherhood of Carpenters, Local 610 v. Scott*, 51 U.S.L.W. 5173.

Like commercial speech, commercial association may not be unreasonably regulated.[18] The permissible degree of governmental interference should be narrow when close, personal relationships touching upon interests in property are also implicated. "[I]t is the constitutional right of every person . . . to choose his social intimates and *business partners* solely on the basis of personal prejudices . . . . These and other rights pertaining to privacy and private association are themselves constitutionally protected liberties." *Bell v. Maryland*, 378 U.S. 226, 313 (1964) (Goldberg, J., concurring) (emphasis added). As Justice Powell stated:

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[17] *Cf. Marshall v. Barlow's, Inc.*, 436 U.S. 307, 312 (1978) ("it is untenable that the ban on warrantless searches was not intended to shield places of business as well as of residence"); *See v. City of Seattle*, 387 U.S. 541, 543 (1967) (a "businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property").

[18] To restrict the corollary right of commercial speech, the government must show that the restriction directly advances, in a manner no more extensive than necessary, a substantial governmental interest. *Bolger v. Youngs Drug Products Corp.*, 51 U.S.L.W. 4961, 4963 (U.S. June 24, 1983); *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 564 (1980).

> In certain personal contractual relationships, . . . where the offeror selects those with whom he desires to bargain on an individualized basis, or where the contract is the foundation of a close association[,] . . . there is reason to assume that, although the choice made by the offeror is selective, it reflects "a purpose of exclusiveness" . . . . Such a purpose, certainly in most cases, would invoke associational rights long respected.

Runyon v. McCrary, 427 U.S. 160, 187-88 (1976) (Powell, J., concurring).

"'[A]n essential element of individual property is the legal right to exclude others from enjoying it.'" *Kaiser Aetna v. United States*, 444 U.S. 164, 180 n.11 (1979) (quoting *International News Service v. Associated Press*, 248 U.S. 215, 250 (1918) (Brandeis, J., dissenting)). Construing Title VII to encompass Petitioner's claim would abrogate this right.[19]

> I believe that, whether this Court likes it or not, the Constitution recognizes and supports the concept of private ownership of property. The Fifth Amendment . . . means to me that there is no right to picket on the private premises of another to try to convert the owner or others to the views of the pickets. It also means, I think, that if this Court is going to arrogate to itself the power to act as the Government's agent to take . . . property to give to the pickets for their use, the Court should also award . . . just compensation for the property taken.

Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 330 (1968) (Black, J., dissenting), *overruled*, *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972). Justice Black's dissenting view was vindicated in *Hudgens v. NLRB*, 424 U.S. 507 (1976).

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[19] It also would be contrary to the legislative history of Title VII. *See* 110 Cong.Rec. 13,081 (1964) (remarks of Senator Clark) ("Still, the bill would not do a single thing to a property right.").

B. As Advocates, Lawyers Are Entitled to the Highest Degree of Associational Freedom

Lawyers are advocates of "both public and private points of view"; their "freedom to engage in association . . . is an inseparable aspect of the 'liberty' assured by the Due Process Clause"; and "it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters." *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958).[20]

"While the freedom of association is not explicitly set out in the [First] Amendment, it has long been held to be implicit in the freedoms of speech, assembly, and petition."[21]

Freedom of association necessarily includes the right to select those who will constitute the associational group. *See NAACP v. Alabama ex rel. Patterson*, 357 U.S. at 466 (the right of association is the "right . . . to pursue . . . lawful private interests privately and to associate freely with others in doing so").

Lawyers are required "to represent . . . clients zealously within the bounds of the law." Model Code of Professional Responsibility EC 7-1 (1980). Whether "[l]aw firms are businesses"[22] or not, "the business" of law

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[20] *Cf. Griswold v. Connecticut*, 381 U.S. 479, 483 (1965) ("we have protected forms of 'association' that are not political in the customary sense but pertain to the social, legal, and economic benefit of the members").

[21] *Healy v. James*, 408 U.S. 169, 181 (1972); *see, e.g., Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539, 543-44 (1963); *NAACP v. Button*, 371 U.S. 415, 430 (1963); *Louisiana ex rel. Gremillion v. NAACP*, 366 U.S. 293, 296 (1961); *Bates v. City of Little Rock*, 361 U.S. 516, 522-23 (1960); *see also* 1 A. de Tocqueville, Democracy in America 193 (J. Lawrence ed. 1969) ("The most natural right of man, after that of acting on his own, is that of combining his efforts with those of his fellows and acting together. Therefore the right of association seems . . . by nature almost as inalienable as individual liberty.").

[22] Abrams Brief at 36.

firms is advocacy.[23] They are bound by bonds of trust and confidence, and their expression and association are protected from governmental intrusion. *See NAACP v. Button*, 371 U.S. 415, 429 (1963).

In *Button*, this Court found "that the activities of the NAACP, its affiliates and *legal staff*" to vindicate the constitutional and other rights of persons seeking legal redress were a protected "mode[] of expression and association." *Id.* at 428-29 (emphasis added).[24] *Button* was not limited to political issues. " 'Great secular causes, with small ones, are guarded.' " *UMW v. Illinois State Bar Association*, 389 U.S. 217, 223 (1967) (citation omitted).[25]

Lawyers represent their clients in secular causes, great and small, before courts, legislatures, and administrative agencies. They appeal to juries and to judges, to Congresses and to conventions, to justices of the peace and to departments of defense. They seek liberty and property for individuals and corporations, rich and poor, guilty and not guilty. They fight against one government

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[23] Practice of law . . . embraces . . . transactions [that] may have no direct connection with court proceedings, [for] they are always subject to becoming involved in litigation. . . . These "customary functions of an attorney or counsellor at law" . . . bear an intimate relation to the administration of justice by the courts . . . .

In re Opinion of the Justices, 289 Mass. 607, 613-14, 194 N.E. 313, 317 (1935); *see Stanton v. Embrey*, 93 U.S. 548, 557 (1877).

[24] In describing the ways in which lawyers from the NAACP or the NAACP Legal Defense and Education Fund, Inc., were called into the litigation, the Court stated that "[i]n effect . . . the prospective litigant retains not so much a particular attorney as the 'firm' of NAACP and Defense Fund lawyers, which has a corporate reputation for expertness in presenting and arguing the difficult questions of law that frequently arise in civil rights litigation." *NAACP v. Button*, 371 U.S. at 421-22.

[25] *See United Transportation Union v. State Bar*, 401 U.S. 576 (1971); *Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar*, 377 U.S. 1 (1964).

for another government or against all governments for their clients. They do this in and out of court, and, in all societies, those who advocate are always at risk. Their associational freedom is entitled to the highest degree of constitutional protection.

II. THE EXECUTIVE BRANCH MUST NOT BE ALLOWED TO ENCROACH UPON THE INDEPENDENCE OF LAW FIRMS

A. The EEOC Is an Advocacy Agency

Congress vested the EEOC, a politically appointed agency of the Executive Branch, with enforcement responsibility for Title VII. A former Chairman of the EEOC described the agency as "one of the few federal agencies oriented toward its consumer group rather than toward those whom it regulates" and stated that "[t]he agency essentially has been reacting to the public rather than doing what Congress intended it to do." [26]

During the debates on Title VII, concern was expressed about whether the EEOC would or would not be impartial. Representative Bella Abzug stated: "[W]e have to have a partiality in our [Equal Employment Opportunity] [C]ommission which understands that it has to fulfill the needs of the blacks and the minorities and the women in this country for equal employment." 117 Cong.Rec. 32,096 (1971). In 1972, Congress ratified partiality.

Consistently, the agency has had a philosophy, a way of looking at the society, which allows it to single out and proceed against almost any employer. A former Chairman summed it up: " 'It is very difficult for a company that did not start hiring yesterday, literally yesterday, not to be in violation.' " Reinhold, *U.S. to Monitor Hiring Practices of Big Concerns*, N.Y. Times, Jan. 5, 1978, at 1, col. 6 (statement by Eleanor Holmes Norton).

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[26] London, *A Conversation with Eleanor Holmes Norton*, 3 Employee Rel.L.J. 313, 316, 319 (1978).

The EEOC's advocacy role was the precise reason that the Minority Report prevailed and Congress did not grant the agency National Labor Relations Board (NLRB)-like powers.

> We contend that the EEOC has attained an image as an advocate of civil rights, and properly so. For this very reason, we submit that it cannot be an impartial arbiter of the law. An advocate, by nature, represents one side of an issue. How can he then be asked to apply the law without prejudice?

H.R. Rep. No. 92-238, 92d Cong., 1st Sess. 59 (1971) (Minority Report).[27]

The agency's role as a "zealous proponent" has understandably led it to excess,[28] and often attorneys' fees have been awarded against it under the standard articulated in *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 422 (1978) (fee awards may be made when a "claim was frivolous, unreasonable, or groundless, or . . .

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[27] References in the House to the "strong advocate role [the] EEOC has played in the past," 117 Cong.Rec. 31,970 (1971) (remarks of Rep. Perkins), were echoed in the Senate.

To Senator Tower, "Instead of acting as an impartial mediator, the Commission has in many instances been an antagonist." 118 Cong.Rec. 595 (1972). To Senator Fannin, "The Equal Employment Opportunity Commission [was] a zealous proponent of the employee." 118 Cong.Rec. 699 (1972).

[28] *See, e.g., EEOC v. Anchor Continental, Inc.*, 74 F.R.D. 523, 526 (D.S.C. 1977) (The EEOC "has a weak case and hopes to harass the defendant into making some type of settlement. 'Bluff and harass' are the nicest words to describe the action of the plaintiff. 'Extortion' would probably be more appropriate."); *see also EEOC v. Zia Co.*, 582 F.2d 527, 532 (10th Cir. 1978); *EEOC v. Ipco Hospital Supply Co.*, 32 Fair Empl.Prac.Cas. (BNA) 130 (S.D.N.Y. June 23, 1983); *EEOC v. Sears, Roebuck & Co.*, 504 F.Supp. 241, 249, 250 (N.D.Ill. 1980); *EEOC v. First Alabama Bank*, 440 F.Supp. 1381, 1385 (N.D.Ala. 1977), *aff'd*, 611 F.2d 132 (5th Cir. 1980); *EEOC v. J.C. Penney Co.*, 11 Empl.Prac.Dec. (CCH) ¶ 10,661, at 6799 (N.D. Ala. 1975).

the plaintiff continued to litigate after it clearly became so").[29]

B. The Independence of the Bar Is Essential

The issue before the Court is not whether law firms have a "right to discriminate" but whether Congress intended to inject an agency of the Executive Branch, a governmental advocate, into disputes with the advocates of the government's opponents.

To sue under Title VII, a private party must first file a charge with the EEOC (or have a charge filed on his behalf). 42 U.S.C. § 2000e-5. A politically selected Commissioner of the EEOC also may file a charge. *Id.* §§ 2000e-4(a), 2000e-5(b). Once the charge is filed, the EEOC must investigate,[30] determine reasonable cause, and attempt voluntary compliance before initiating a lawsuit. *Id.* §§ 2000e-5(b), 2000e-5(f)(1). Subpoenas may be issued, *see id.* § 2000e-9 (citing 29 U.S.C. § 161); client files may be taken and examined, *see* 42 U.S.C. § 2000e-8(a); and clients may be called to testify about the lawyer in question. *See id.* § 2000e-9 (citing 29 U.S.C. § 161).

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[29] *See, e.g., EEOC v. Pierce Packing Co.*, 669 F.2d 605, 609 (9th Cir. 1982); *EEOC v. First Alabama Bank*, 595 F.2d 1050, 1056 (5th Cir. 1979); *EEOC v. Shoney's, Inc.*, 542 F.Supp. 332, 334 (N.D.Ala. 1982); *EEOC v. Union Camp Corp.*, 536 F.Supp. 64, 65 (W.D.Mich. 1982); *EEOC v. St. Louis-S.F. Ry.*, 23 Empl.Prac.Dec. (CCH) ¶ 30,969, at 15,993-94 (N.D.Okla. 1980), *appeal dismissed*, 651 F.2d 719 (10th Cir. 1981); *EEOC v. Datapoint Corp.*, 457 F.Supp. 67-68 (W.D.Tex. 1978). Attorneys' fees also were awarded prior to *Christiansburg*. *See, e.g., Black Musicians v. Local 60-471, American Federation of Musicians*, 442 F. Supp. 855, 859 (W.D.Pa. 1977); *EEOC v. Howard Johnson Co.*, 16 Empl. Prac.Dec. (CCH) ¶ 8126, at 4591 (S.D.Ala. 1977); *EEOC v. Bendix Corp.*, 435 F.Supp. 76, 78 (M.D.Fla. 1977); *EEOC v. New Enterprise Stone & Lime Co.*, 74 F.R.D. 628, 633 (W.D.Pa. 1977).

[30] The scope of the EEOC investigation is not restricted to the allegations in the charge but may be expanded to inquire into matters growing out of a reasonable investigation of that charge. *See, e.g., EEOC v. Bailey Co.*, 563 F.2d 439, 446 (6th Cir. 1977), *cert. denied*, 435 U.S. 915 (1978).

Lawyers, independent of government, are essential to a system of checks and balances carefully designed to provide "a bulwark against tyranny." *United States v. Brown*, 381 U.S. 437, 443 (1965); *cf. INS v. Chadha*, 51 U.S.L.W. 4907, 4916 (U.S. June 23, 1983) ("The Constitution sought to divide the delegated powers of the new federal government . . . to assure . . . that each Branch of government would confine itself to its assigned responsibility."). This Court in *Ex parte Garland*, 71 U.S. (4 Wall.) 366 (1867), struck down a legislative effort to exclude certain attorneys from practice in the federal courts. Similarly, in *First Bank & Trust Co. v. Zagoria*, 250 Ga. 844, 845-46, 302 S.E.2d 674, 675 (1983), the Supreme Court of Georgia held that the legislature "cannot constitutionally cross the gulf separating the branches of government by imposing regulations upon the practice of law."[31]

The Congress that considered the Civil Rights Act of 1964 simultaneously considered the Criminal Justice Act of 1964. 18 U.S.C. § 3006A. On January 15, 1964, five months prior to the enactment of Title VII, Representative McCulloch spoke of the "clear and present danger that would exist to our basic liberties if a federal public

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[31] *Zagoria* concerned the personal liability of a lawyer-shareholder, Stoner, in a professional corporation for the misdeeds of a fellow lawyer-shareholder. Stoner was not personally involved in his colleague's misconduct. The Supreme Court of Georgia saw a "call[] for the exercise of [its] authority to regulate the practice of law" and held the attorney who was not personally involved to be nevertheless responsible. *First Bank & Trust Co. v. Zagoria*, 250 Ga. at 845, 302 S.E.2d at 675. The court explained that:

> A lawyer's relationship to his client is a very special one. *So also is the relationship between a lawyer and the other members of his or her firm a special one.* When a client engages the services of a lawyer the client has the right to expect the fidelity of other members of the firm. It is inappropriate for the lawyer to be able to play hide-and-seek in the shadows and folds of the corporate veil and thus escape the responsibilities of professionalism.

Id. at 846, 302 S.E.2d at 675 (emphasis added).

defender system was established." 110 Cong.Rec. 455 (1964). The problem he (and ultimately both Houses of Congress) foresaw was that a federal public defender service would adversely affect the independence of the bar. He quoted approvingly an address by Justice Brennan:

> The plain fact is that an independent bar is just as essential to the preservation of freedom as is an independent judiciary, or the bill of rights in our Federal and State constitutions. The bar is the creation of a democratic people to intervene as champion between the individual and his Government.

Id. (quoting Statement by the Honorable William J. Brennan, printed in Legal Aid Brief Case at 76-77 (Nov. 1, 1956)); [32] *see Ferri v. Ackerman*, 444 U.S. 193, 199 n.15, 204 (1979); *see also* Burger, *The Role of the Law School in the Teaching of Legal Ethics and Professional Responsibility*, 29 Clev.St.L.Rev. 377, 378 (1980) ("An independent judiciary alone is not enough; it must be supported by a strong, independent, courageous and competent bar. This is an imperative for a free people.").

As Justice Jackson noted, "[I]t too often is overlooked that the lawyer and the law office are indispensable parts of our administration of justice. . . . The welfare and tone of the legal profession is therefore of prime consequence to society," *Hickman v. Taylor*, 329 U.S. 495, 514-15 (1947) (Jackson, J., concurring), and like admissions to the bar and disciplinary proceedings, is within the province of the Judicial Branch.[33] For the existence

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[32] Justice Brennan continued:

> Too often in history the citizens of other countries possessing constitutions and bills of rights similar to our own lost their liberties because they did not possess a bar with sufficient courage and independence to establish those rights by a brave assertion of the legal processes developed for their vindication.

110 Cong.Rec. 455 (1964) (citation omitted).

[33] *See, e.g., District of Columbia Court of Appeals v. Feldman*, 51 U.S.L.W. 4285, 4290 (U.S. Mar. 23, 1983) (qualification for

of liberty, "[i]t is . . . important both to society and the bar itself that lawyers be unintimidated—free to think, speak, *and act* as members of an Independent Bar." *Konigsberg v. State Bar*, 353 U.S. 252, 273 (1957) (emphasis added).

III. CONFIDENTIALITY IS BOTH THE STRENGTH AND VULNERABILITY OF LAWYERS

In construing the permissible reach of a particular statute, this Court evaluates the practical effects of its decision. Any other approach would engender disrespect for the law. Extension of Title VII to the law firm partnership decision (1) necessarily would intrude on lawyer-client confidentiality, which in turn would force law firms into settlement of even groundless claims of discrimination and (2) would pose insurmountable remedial problems.

A. Intrusion into Lawyer-Client Confidentiality

"The most positive criteria for associate advancement are the ability to get along with the firm's clients, excellence in work product, compatibility with others in the office, and creativity in handling legal matters." Altman, *15 Steps to Partnership*, Barrister, Spring 1983, at 4, 62 (15 Steps to Partnership). For example, in this case, affidavits state that the partnership decision was influenced by Petitioner's "difficulties in dealing with other attorneys and with clients." J.A. 47, 52.

When a law partnership bases its denial of partnership on an associate's inadequate work for clients, the inquiry has to intrude upon the confidentiality of the attorney-client relationship. "It is not only the conclusions that may be reached . . . which may impinge on rights guaranteed . . . but the very process of inquiry leading to

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admission); *Middlesex County Ethics Comm. v. Garden State Bar Association*, 457 U.S. 423, 433 (1982) (disciplinary proceeding).

findings and conclusions." *NLRB v. Catholic Bishop*, 440 U.S. 490, 502 (1979).[34]

Among the interrogatories Petitioner directed at King & Spalding was the following:

> If you contend that defendant's decision . . . was based on . . . deficiencies in plaintiff's performance of her professional duties and responsibilities in representing . . . clients . . . , please identify each such matter by stating:
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> (1) the name of the client;
>
> (2) the name of the matter;
>
> (3) the file or other identifying number of the matter; and
>
> (4) describe the specific . . . difficulty in plaintiff's performance; and
>
> (5) identify (A) the persons who[] . . . have personal knowledge of the facts . . . in connection with a specific matter or client, and (B) the documents that defendant contends . . . reflect . . . any . . . deficiency in plaintiff's performance.

J.A. at 99-100.[35]

This interrogatory provides a clear example of why a law partnership, when deciding whether to defend itself, faces a "'grisly,' hard, Hobson's choice." *Whitus v. Balkcom*, 333 F.2d 496, 499 (5th Cir.), *cert. denied*, 379 U.S. 931 (1964).[36] If law partners defend on the merits

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[34] *NAACP v. Button*, 371 U.S. at 433 ("The threat of sanctions may deter . . . almost as potently as the actual application of sanctions.").

[35] Answers were deferred until after a decision on the jurisdictional issue. *See* J.A. 124.

[36] Petitioner and the EEOC understand this. On March 31, 1980, Petitioner's counsel wrote the district court proposing, among other things, "the entry of an appropriate protective order protecting the confidentiality of information disclosed by discovery." J.A. 80-81. Petitioner's counsel continued:

and challenge a plaintiff's performance for clients, partners will be forced to answer questions about their clients and, inevitably, about the substance of their representation, thereby violating their duties as lawyers.[37] Their alternative is to buy their way out or not raise the defense and lose.

As one commentator has noted:

> The issue of confidentiality of client records and communications has not yet arisen in any reported cases. However, it will almost certainly arise when cases involving discharge or failure to promote go to trial. The courts have only begun to grapple with some of these issues in the discovery cases. Discrimination is rarely proved directly. . . .

Bardeen, *The Legal Profession: A New Target for Title VII*, Cal.St.B.J., Sept. 1980, at 360, 362.[38]

Another commentator saw a potential conflict of interest "when a company attorney finds himself or herself the victim of discrimination, and wishes to use information obtained as an attorney to end such practices." Olmsted, *Law as a Business: The Impact of Title VII on the Legal "Industry,"* 10 Val.U.L.Rev. 479, 483 (1976). The author notes that it would "seem almost impossible for an

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> [W]e recognize that discovery . . . is likely to involve some of the most private and sensitive decisions that a law firm makes . . . .
>
> I don't want to be forced to explore these sensitive issues by discovery unless it becomes necessary . . . nor do I want King & Spalding to feel that discovery into their private affairs is being used as any kind of lever to coerce the firm to settle a claim which it believes to be without merit.

J.A. 81; *see* J.A. 149-50, 252-53 (EEOC requests for confidential information regarding King & Spalding's internal structure).

[37] *See* Model Code of Professional Responsibility DR 4-101 (1980); *id.* EC 4-1.

[38] "A Court may, of course, issue protective orders . . . . That power might well be ineffective in these cases . . . ." Note, *Applicability of Federal Antidiscrimination Legislation to the Selection of a Law Partner*, 76 Mich.L.Rev. 282, 303 n.123 (1977).

attorney-employee of a corporation to separate many facts learned [during the course of employment] . . . . Such an employee never stops being an attorney." *Id.* at 496.[39]

Already associates have "powerful leverage" [40] to pressure law firms into "settlement of essentially groundless claims of discrimination." Note, *Applicability of Federal Antidiscrimination Legislation to the Selection of a Law Partner*, 76 Mich.L.Rev. 282, 303 n.123 (1977). One of the first cases [41] challenging a law firm's decision-making process was settled after Columbia University's EEOC-funded employment law project "began to question them about their partners' earnings *and other matters firms are loathe to make public.*" C. Epstein, Women in Law 186 (1983) (emphasis added) (Women in Law). Additionally, "the mere filing of a civil action . . . may cause damage to . . . good names and reputation and may also result in economic harm." *Southern Methodist University Association of Women Law Students v. Wynne & Jaffe*, 599 F.2d 707, 713 (5th Cir. 1979).

Petitioner wrote to the district court of a desire not to "want King & Spalding to feel that discovery into their private affairs is being used as any kind of a lever to coerce the firm to settle a claim that it believes to be without merit." J.A. 81. Petitioner also professed a desire "to avoid . . . public embarrassment." J.A. 84. Petitioner's reference to the "Dred Scott case of the legal

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[39] *See Hull v. Celanese Corp.*, 513 F.2d 568, 572 (2d Cir. 1975).

[40] [I]n some instances a more attractive alternative than actually starting legal proceedings may simply be to communicate to the employer a knowledge of one's legal rights and the willingness, if necessary, to resort to legal proceedings. Such communication may itself provide powerful leverage in negotiating for fair employment . . . for the annoyance and possible public embarrassment . . . provide an incentive to behave fairly.

Comment, *Self Defense for Women Lawyers: Enforcement of Employment Rights*, 4 U.Mich.J.L.Ref. 517, 544 (1971).

[41] *Blank v. Sullivan & Cromwell*, 418 F.Supp. 1 (S.D.N.Y. 1975).

profession" [42] is mere advocacy; [43] however, it does call for a response.

Long before Petitioner was born, King & Spalding partners were advocating respect for the rights of individuals.[44] Later, when the forces of racial segregation threatened to obstruct this Court's orders, King & Spalding partners stepped forward to urge respect for the rule of law [45] and this Court's commands.[46]

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[42] Petition for a Writ of Certiorari at 29.

[43] *See also* Petitioner's Brief at 23 ("Can . . . [a] law firm . . . post a sign on the door of its partnership meetings that reads . . . NO WOMEN, NO BLACKS, NO JEWS ADMITTED").

King & Spalding has two female partners and three Jewish partners. While there are no black partners at present, a black senior associate recently accepted appointment as United States Attorney for the Northern District of Georgia.

[44] *See, e.g.*, Address of Jack J. Spalding at 3, 5, 7, 116th Anniversary of the Hibernian Society of Savannah, Georgia (Mar. 17, 1928) (condemning: "lynching"; "flogging"; "a masked unit of ten men"; and "[t]he lynching of Frank [which] like John Brown's spirit, still 'goes marching on' "; a Senator telling a fellow Senator that if he came "to his state . . . and . . . advocate[d] freedom of conscience in religious matters, that he would be tarred and feathered"; and "You and I . . . [who] fail to discharge our duty . . . . We have become materialized and commercialized, selfish, greedy and money making and have lost our patriotism.").

[45] In 1960, John A. Sibley, a former partner in the firm, was asked by Griffin B. Bell to head a state commission that held hearings regarding school desegregation. "[He] tried to make it clear at the hearings, so the people wouldn't delude itself, that under the law they could not continue with their segregated public schools." Hopkins, *A Georgia Patriarch*, Atlanta J. & Const., Aug. 6, 1977, A1, col. 1, at A4, col. 3.

[46] *Rights Advocate Troutman Dies*, Atlanta J., Mar. 16, 1973, at A4, col. 1:

> Robert B. Troutman Sr., one of Georgia's most prominent attorneys and one of the early advocates of voluntary desegregation, died Thursday. . . .
>
> . . . .

[Footnote continued on page 29]

B. The Insurmountable Remedial Problems

Petitioner tells this Court not to concern itself with the consequences of its decision. The Government also is unconcerned. "This case involves no questions of relief," the EEOC writes. EEOC Brief at 12 n.4.

The court of appeals, however, was so concerned that, following oral argument, Petitioner's counsel felt it necessary to write to that court.

> The questions of remedy seemed to be troubling members of the Court during the oral argument. It should be noted at the outset that appellant is now a partner in another Atlanta law firm; [47] appellant

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[46] [Continued]

> He was honored by Pope Paul VI and by the National Conference of Christians and Jews.
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> . . . .
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> In the 1950[s] Troutman was one of the lawyers who tried to help Georgians adapt to the 1954 U.S. Supreme Court decision ending the "separate but equal" school systems. . . .
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> . . . .
>
> Troutman urged fellow lawyers to seek a peaceful solution to the racial question, and asked them to "make the machinery of justice work." He added, "It is your supreme duty to see that every individual citizen, regardless of race or creed, shall receive justice under the law."

[47] In the two and one-half years since Petitioner left King & Spalding, she has been a member of not one but two law firms. According to II Martindale-Hubbell Law Directory 820, 3301B (1981), Petitioner was an associate with Haas, Holland, Lipshutz, Levison & Gibert. By 1982, she was a partner in that firm. II Martindale-Hubbell Law Directory 849, 3609B (1982). By 1983, she had become a member of another Atlanta law firm, O'Callaghan, Saunders & Stumm. II Martindale-Hubbell Law Directory 537, 1621B (1983).

> Not too long ago, the idea that a group of partners from a major law firm would pick up and move to another firm was all but unthinkable. But these days, such defections are fast and furious . . . .
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> . . . .

[Footnote continued on page 30]

> did not in the lower court and is *not* now seeking the remedies of reinstatement and admission to partnership.

Letter from Emmet J. Bondurant, II, to Hons. Gerald B. Tjoflat, Peter J. Fay, and George C. Young at 9 (Jan. 25, 1982) (emphasis in original).

In this Court, only the ACLU forthrightly suggests that "[w]here a *post-promotion* act of discrimination against a partner is a pretext to avoid the command of Title VII, courts possess ample authority to look through such a shabby ploy and enforce the act." ACLU Brief at 27 (emphasis added).

If Petitioner and the EEOC have their way, courts will be asked to order the admission of unwanted persons into law partnerships. Thereafter, collegially made decisions will be vulnerable to charges of discrimination.[46] Partners will have to concern themselves with the "leverage" provided another partner by a court order. There may be allegations of disparate treatment arising from the assignment of cases or the assignment of associates to a particular partner. The EEOC and courts may be called upon to answer questions regarding the "case loads" of partners and whether "overwork" was the result of "post-

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[47] [Continued]

> Switching firms is similar to divorce . . . .

Lewin, *Business and the Law: Hiring Away Legal Talent*, N.Y. Times, July 12, 1983, at D2, col. 1-3.

> [Such] a thing had been unheard of a decade before—gentlemen didn't raid each other's firms. Once raiding was legitimized for municipal bonds, . . . it spread to other areas of the law.

P. Hoffman, Lions of the Eighties 32 (1982).

[48] Of a hypothetical twenty equally brilliant law school graduates in a law office, one is selected to become a partner. Extensive discovery would reveal that the other nineteen were almost equally well qualified. . . . And, of course, even judges are plagued by the difficulty of decision in selecting law clerks out of the many equally well qualified.

Faro v. New York University, 502 F.2d 1229, 1232 (2d Cir. 1974).

promotion" discrimination. Questions may arise regarding whether the unwanted partner is receiving equal "pay" for equal work, equal "pay" for work of comparable value, and just what is "equal," "substantially equal," "similar," or "comparable" when comparing different kinds of legal work, partners' hours, skills, seniority, and the ability to attract and hold clients. Partners review requests of clients for the assignment of particular partners to their work and decide who is to be in charge of a particular client. These requests and decisions may be subject to EEOC review and litigation, for they may fall within the agency's definition of forbidden "customer preference."

The public cannot possibly be well-served by lawyers forced to practice together after rejection by a review of partner-peers, and law partners should not be required to entrust their client's cause to a partner whom they rejected.

IV. STATISTICS AND STEREOTYPES

A. The Legal Profession and Women: Statistical Information

In 1981, there were 581,000 lawyers and judges—more than twice the number only eleven years earlier.[49] By the year 2000, it is estimated that there may be one million lawyers and that the size of the judiciary may double. Janofsky, *The Future of the Legal Profession and the Role of the American Bar Association*, 11 U.Tol.L.Rev. 201, 202, 204 (1980).

Despite the tremendous growth in the number of lawyers, "the overall pattern of distribution of lawyers among private practice, government employment, employment in business or industry, and in [other] miscellane-

[49] *See* U.S. Bureau of the Census, Statistical Abstract of the United States: 1982-83, at 388, Table 651 (103rd ed. 1982) (number of lawyers and judges in 1981); U.S. Bureau of the Census, Historical Statistics of the United States: Colonial Times to 1970, Part 1, at 140, Table 233-682 (1975) (number of lawyers and judges from 1900 to 1979).

ous categories . . . has not altered significantly in the last 10 years." Curran, *Lawyer Demographics* 14 (1982) (paper presented by the Associate Executive Director of the American Bar Foundation at ABA 1982 Annual Meeting) (preliminary analysis of computerized information provided by Martindale-Hubbell to American Bar Foundation) (Lawyer Demographics). Approximately 70% of all lawyers are in private practice. Almost half of these lawyers are solo practitioners, and another one-third practice with law firms which have fewer than 10 lawyers. *Id.* at 9. Of all law firms, 92% have fewer than 10 attorneys. *Id.* at 11. Only "[a]bout five percent of the nation's law graduates end up at the big firms." Women in Law at 176.

"Between 1910 and 1970, women represented less than 4% of this nation's lawyers . . . ." AAUW Brief at 8 (citation omitted).[50] "Since 1970, the percentage of women in the law has increased dramatically." Massachusetts Women's Brief at 5 (citation omitted).[51] "Over the nine-year period from 1972 through 1981, the number of women employed . . . as lawyers and judges increased

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[50] Actually, females comprised less than 3% of the nation's attorneys between 1948 and 1970. *See* American Bar Foundation, The 1971 Lawyer Statistical Report 5, Table 1 (1972) (number and percentage of lawyers by sex).

[51] According to the *National Law Journal*, Cynthia Fuchs Epstein, the author of *Women in Law*, cites the competition for legal talent among firms as one of the causes of the rise in the number of women lawyers. Flaherty, *Women & Minorities: The Gains*, Nat'l L.J., Dec. 20, 1982, 1, col. 1, at 9, col. 3. Starting salaries at major law firms reflect the intensity of the competition. *See* Flaherty, *N.Y. Firms Hold Line on Associate Salaries*, Nat'l L.J., Sept. 27, 1982, at 2, col. 3 (major firms to "hold the line" on salaries for first-year associates at $43,000). Epstein writes of the "courting process" to recruit female and male talent from Ivy League law schools and of the Wall Street law firms that provide them "first-class hotel suites, gourmet dinners, and tickets to Yankee Stadium and symphony concerts." Women in Law at 176. "[I]n reality the whole system is part of the recruitment mechanism." E. Smigel, The Wall Street Lawyer 68 (1969).

more than three-fold from 3.8% . . . to 14.1%." Petitioner's Brief at 22 (citation omitted).

The rise in the number of female lawyers has been reflected in law firms, especially the large ones. In 1970, 1.3% of law firm partners and 2.7% of the associates were women. *See* American Bar Foundation, Women Lawyers: Supplementary Data to the 1971 Lawyer Statistical Report 8, Table 6 (1973). By 1982, according to the *National Law Journal* survey of 151 of the nation's 200 largest firms, 17% of the lawyers at big firms—3.2% of the partners and 28% of the associates—were women. Flaherty, *Women & Minorities: The Gains*, Nat'l L.J., Dec. 20, 1982, 1, col. 1, at 8, col. 1 (figures compiled from table reporting survey results) (Nat'l L.J. 1982 Survey).[52] In fact, the overall percentage of women in large law firms exceeds the overall percentage of female attorneys. *Compare id.* at 1, col. 2 (17% women at big firms), *with id.* at 9, col. 1 (14% women lawyers).

During the last four terms of the Supreme Court, approximately 17% of its law clerks were women. In

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[52] In recent years, the increase in the percentage of women at big firms—at both the associate and partnership level—has far out-stripped the overall rate of growth at these firms. From 1980 to 1981, as the number of associates at the 50 largest firms increased by aproximately 10% (5820 to 6408), the number of female associates increased by almost 24% (1242 to 1537). Burke & Johnson, *More Women on the Way Up*, Nat'l L.J., Apr. 20, 1981, at 1, col. 1 (survey of 50 largest law firms) (figures compiled from reported data). During this same period, the total number of partners at these firms increased by 11.5% (3832 to 4271) while the number of female partners increased by 39% (87 to 121). *Id.* Similarly, from 1981 to 1982, as the number of associates at the big firms increased by approximately 9% (11,019 to 12,030), the number of female associates increased by 21% (2766 to 3351). Nat'l L.J. 1982 Survey at 8, col. 1 (figures compiled from table reporting survey results). And while the total number of partners at these firms rose by 7.3% (8586 to 9210) from 1981 to 1982, the number of female partners increased by 40% (212 to 297). *Id.*

1979-80, 6 of 32,[53] or 19%, were women; in 1980-81, 3 of 32,[54] or 9%, were women; in 1981-82, 7 of 32,[55] or 22%, were women; and in 1982-83, 6 of 34,[56] or 18%, were women.

Women accounted for approximately 50% of the increase in the number of associates at large law firms in both 1981[57] and 1982.[58] "[T]he low partnership percentage is likely to rise as the[] [female] associates gain seniority." Nat'l L.J. 1982 Survey at 9, col. 3.

"Law school figures reflect that this trend towards increasing numbers of women in the law will continue." Massachusetts Women's Brief at 6. While "[i]n 1964, there were fewer than 2,200 women (4%) enrolled in accredited law schools[,] . . . [b]y 1981, the number of women studying law had grown to 44,986 or 35% of the total law school enrollments." Petitioner's Brief at 20 (citations omitted). The growth during the last decade has been particularly striking.[59]

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[53] Marcus, *Few Women to Clerk at High Court*, Nat'l L.J., Aug. 4, 1980, at 3, col. 1; Marcus, *High Court Roster*, Nat'l L.J., Sept. 24, 1979, at 6, col. 1.

[54] Marcus, *Few Women to Clerk at High Court*, Nat'l L.J., Aug. 4, 1980, at 3, col. 1.

[55] Carelli, *No Justice for 3 Supreme Court Clerks*, Nat'l L.J., Aug. 10, 1981, at 3, col. 2 (figures reflect ratio prior to Justice Potter Stewart's retirement).

[56] Carelli, *New Clerks at Court: A Roster*, Nat'l L.J., July 19, 1982, at 3, col. 1.

[57] *See* Burke & Johnson, *More Women on the Way Up*, Nat'l L.J. Apr. 20, 1981, 1, col. 1, at 11 (chart) (295, or 50.2%, of 588 new associates at 50 largest firms were women) (figures compiled from reported data).

[58] *See* Nat'l L.J. 1982 Survey at 8 (585, or 57.9%, of the 1011 new associates at 151 of 200 largest firms were women) (figures compiled from table reporting survey results).

[59] *See* ABA, Section of Legal Education and Admissions to the Bar, *A Review of Legal Education in the United States—1981-82*, at 54 (1982) (enrollment in ABA-approved schools by year and sex).

The number of black and other minority group lawyers, although still low, also has increased. Between 1972 and 1981, the percentage of black and other non-white lawyers and judges grew from 1.9% to 4.6%. *See* U.S. Bureau of the Census, Statistical Abstract of the United States: 1982-83, at 388, Table 651 (103rd ed. 1982). This increase was paralleled by a rise in the percentage of black and other minority law students.[60] Although minority law school graduates are less likely than their non-minority counterparts to enter private practice[61] and a number of large firms have no black or Hispanic attorneys,[62] the percentage of blacks at large law firms mirrors their percentage among all lawyers.[63] "The profit motive

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[60] *See* ABA, Section of Legal Education and Admissions to the Bar, *A Review of Legal Education in the United States—1981-82*, at 50-51 (1982) (black and total minority group students enrolled in approved law schools); *id.* at 53 (total enrollment in approved law schools) (percentages derived from reported data):

Year	% Black	% Total Minority
1969	3.1	4.3
1974	4.5	7.5
1978	4.4	8.2
1981	4.5	8.7

[61] According to the National Association for Law Placement report, 32% of the employed 1980 minority law school graduates were in private practice in 1981 compared to 54% of all employed 1980 law school graduates. *See* National Association for Law Placement, Class of 1980 Employment Report and Salary Survey at 4, Table A (1981). Minorities were approximately twice as likely as the average 1980 law school graduate to enter government service. *Id.* (26.6% to 13.7%).

[62] *See* Nat'l L.J. 1982 Survey at 1, col. 1.

[63] *Compare* Nat'l L.J. 1982 Survey at 1, col. 1 ("black attorneys now constitute 2.9 percent of the lawyers" at big firms) *with id.* at 9, col. 1 ("blacks accounted for 2.7 percent" of all lawyers in 1980). "[O]nly Hispanic lawyers seem disproportionately scarce in the big firms." *Id.* at 1, col. 1.

may also explain the rise in the number of black lawyers at the big firms, suggests Mr. [William T.] Coleman. 'There are a lot of good business reasons to hire minority lawyers' he said. . . .[64] 'My experience,' says Mr. Coleman, 'is that every firm is now actively seeking minority lawyers who measure up to its standards.'" Nat'l L.J. 1982 Survey at 9, col. 3.[65]

B. Petitioner's Case Rests on Inaccurate Stereotypes

Petitioner assumes that men as a class discriminate against women as a class. This assumption is not borne out by opinion surveys. Men have outpaced women in support for the Equal Rights Amendment[66] and for efforts to strengthen the status of women.[67] The concepts of equal pay for equal work,[68] of married women working

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[64] As Mr. Coleman explained, "'Now, there are minority mayors, minority water commissioners, and so forth. There are minorities in key positions in corporations. It can be helpful for a firm to have minority lawyers.'" Nat'l L.J. 1982 Survey at 9, col. 4 (quoting William T. Coleman).

[65] *Cf.* ADL Brief at 8 (decline in religious discrimination at law firms against Jews and Catholics).

[66] In 1975, 68% of men and 55% of women favored the Equal Rights Amendment. In 1980, the percentage of men and women favoring the amendment was 52 and 51 respectively. Roper Organization, Inc., The 1980 Virginia Slims American Women's Opinion Poll at 90 (1980).

[67] Men led women in support of efforts to strengthen the status of women by 44% versus 40% in 1970, 49% versus 48% in 1972, and 63% versus 57% in 1974. Louis Harris and Associates, The Virginia Slims American Women's Opinion Poll at 4-5 (1970); Louis Harris and Associates, The 1972 Virginia Slims American Women's Opinion Poll at 2-3 (1972); Roper Organization, Inc., The Virginia Slims American Women's Opinion Poll, Vol. III, at 2-3 (1974).

[68] In 1973 and 1977, nine out of ten men and women alike supported equal pay for equal work. Public Opinion, Jan./Feb. 1979, at 36.

full-time[69] and of a female president[70] have received equal acceptance among men and women.

In 1978, 41% of women interviewed perceived that there was a great deal or a fair amount of discrimination against women as a group. When asked if they personally had been discriminated against, however, only 16% of these women responded affirmatively.[71] In another survey conducted in 1977, only 12% of women employed 20 hours or more a week said they personally had experienced discrimination on the job because of their sex.[72]

Petitioner's assumption that male lawyers as a class desire to discriminate against female lawyers ignores the fact that male law partners of today have almost as many lawyer-daughters as lawyer-sons.[73] Associates must be recruited from law schools that do not allow law firms which discriminate to recruit there.[74] Most students philosophically reject discrimination and will reject law firms that practice it.

The EEOC implicitly concedes that a law firm is under economic pressure not to discriminate in partnership

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[69] In 1977, three out of four men and women alike approved of married women working full-time outside the home. The Roper Organization, Inc., Roper Reports 79-1, at N100-104 (Feb. 1979).

[70] By 1978, eight out of ten men and women alike were ready to elect a woman president. Public Opinion, Jan./Feb. 1979, at 36.

[71] The Roper Organization, Inc., Roper Reports 78-3, at 68, 72 (Apr. 1978).

[72] Quinn & Staines, *The 1977 Quality of Employment Survey* 37 (1978) (Table 3.1) (Institute for Social Research, The University of Michigan).

[73] *Cf.* Nat'l L.J. 1982 Survey at 9, col. 4 (quoting California Court of Appeal Justice Joan Dempsey Klein) (" 'There are lots of senior partners out there who have daughters who are graduating from law school. They have to make room for them.' ").

[74] *See* ABA Standards for the Approval of Law Schools, Standard 211 (1973), *reprinted in* ABA, Approval of Law Schools 6-7 (1979).

selection when it states, "It is not difficult to predict, however, that a firm that wholly divorced its partnership selection process from its relationship with its associates would have enormous difficulty in attracting associates to join it." EEOC Brief at 19 n.8. Petitioner evidently believes that male lawyers have an abiding desire to discriminate against their own economic interests or do not understand what their interests are.

V. THE NEED TO HALT THE TREND TO COMMERCIALIZATION AND BUREAUCRATIZATION

Recently, the former Dean of the Harvard Law School, Derek C. Bok, in a reasoned and provocative criticism of the legal system echoed the Chief Justice's remarks about "a new trend that was not intended." [75] Bok noted that judges sometimes "reach results that affect . . . people in unexpected and undesirable ways." [76]

In *Goldfarb v. Virginia State Bar*, 421 U.S. at 788 n.17, and *Bates v. State Bar*, 433 U.S. at 383-84, this Court emphasized the limited nature of its rulings, but to many these two decisions stamped a seal of approval on the view that law is just another business and law firms are, or ought to be, just like commercial and governmental bureaucracies. King & Spalding rejects that view.

The "notion that top-notch lawyers are professionals, and thus immune from concerns of the marketplace has

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[75] [C]hanges in our society often go virtually unnoticed until they have become a fixed part of the structure and changes in the law exhibit this same characteristic. . . . Changes in the law come silently and, like a glacier, the movement is almost imperceptible . . . .

Fortunately for all of us, scholars . . . may discern a new trend or a new concept—and it is sometimes a new trend that was not intended.

Burger, *Today's "Bizarre" Cases May Contain the Legal Seeds for Future Change*, L.A. Daily J., July 17, 1980, at 4, col. 3.

[76] D. Bok, Harvard University, The President's Report 1981-82 (Report to the Board of Overseers of Harvard University) at 10 (1983).

been replaced by a hustling for clients more familiar in the advertising and insurance business." Lewin, *A Gentlemanly Profession Enters a Tough New Era*, N.Y. Times, Jan. 16, 1983, § 3, at 1, col. 1.[77] "Although none of the top firms has yet . . . run commercials on *60 Minutes*, many other selling tools are gaining acceptance." *The Blue-Chip Lawyers Discover Marketing*, Bus. Week, Apr. 25, 1983, at 89. According to a survey conducted by the *Legal Times*, common marketing strategies among larger firms include the use of public relations firms, the formation of business development committees, the publication of brochures and newsletters, and the conducting of seminars for clients. Graham, *Era of Client Development Has Arrived*, Legal Times, Apr. 18, 1983, 1, col. 1, at 2, col. 2-4 (chart).[78]

The legal profession's internal publications document intensive preoccupation with the commercial aspects of practice. In July 1978, for example, the ABA Journal ran feature articles entitled *Legal Services for the Average Citizen*, *Revising the Criminal Justice Standards*, and *Taking the Rule of Law to Prisons*, as well as a series of articles commemorating the ABA's centenary. 64 A.B.A.J. *passim* (1978). Five years later in July 1983, the Journal's features included *The Right Way to Advertise on TV*, *Choosing Video Equipment for the Law Office*, and *Saving Space and Money with Records Management*. 69 A.B.A.J. *passim* (1983). Articles on law as a business abound.[79]

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[77] *But cf. Bates v. State Bar*, 433 U.S. at 372 n.25 ("Economic considerations suggest that advertising is a more significant force in the marketing of inexpensive and frequently used goods and services with mass markets than in the marketing of unique products or services.").

[78] *See also* Taylor, *Law Firms Squirm, Then Turn to Public Relations*, N.Y. Times, July 27, 1983, at K3, col. 3 ("Active self-promotion by corporate law firms . . . has rapidly become part of the Washington legal scene . . . .").

[79] *See, e.g.*, Israel, *Systems in Law Practice: Planning for Quality and Efficiency*, 26 Wayne L.Rev. 1159, 1164-65 (1980) ("Thrust

"The trends of urbanization and specialization long since have moved the typical practice of law from its small-town setting" [80] and, for years, lawyers have found "themselves strained by the conflicts in professional values vs. the organizational . . . business values." [81] Despite this,

> changes . . . during the past several years have been dramatic—and the pace of change is accelerating. The growth of large, interstate law firms, legal clinics, and prepaid legal services plans; the proliferation of lawyer advertising; and the utilization of technological innovations, such as computerized research, have had a significant impact on the traditional practice of law.

Harrell, *President's Page: Preserving Professionalism*, 69 A.B.A.J. 864 (1983) (Preserving Professionalism).[82]

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into the world of commerce and competition, advertising and marketing, business and management, under the scrutiny of knowledgeable consumers of legal services, lawyers are concluding that the time has arrived to transcend the 'cottage industry' stage and enter the legal profession's version of the industrial revolution."); Cantor, *Managing Legal Organizations in the 1980's*, 11 U.Tol.L. Rev. 311, 315 (1980) ("All lawyers must recognize that a professional organization should be governed by principles of business enterprise.").

[80] *Bates v. State Bar*, 433 U.S. at 374 n.30 (citation omitted).

[81] E. Smigel, The Wall Street Lawyer 307 (1969). Smigel reported that "[o]ne of the largest areas of conflict arises because some partners feel that they no longer are practicing law but are becoming businessmen." *Id.* at 302-03. They confront the difficulty of "maintain[ing] old standards of practice in the face of changing times for fear of going too far from the traditional professional roles and at the same time maintain[ing] their high standards of work." *Id.* at 307.

[82] The pace of change can be gauged from the ABA's efforts in the field of legal ethics. "The original 32 Canons of Professional Ethics were adopted by the American Bar Association in 1908." Model Code of Professional Responsibility at i (1980). Sixty-two years later, the Canons were replaced by the Code of Professional Responsibility. *Id.* Only 10 years later, the Code itself was deemed antiquated. *Proceedings of the Forty-First Annual Judicial*

Current observers of the profession list ten "currents of change," the most profound of which is a "*[l]oss of vision and idealism.* . . . The deprofessionalization of the profession is troubling to all who want law to be more than a business." [83]

" 'Lawyers have for centuries emphasized that the promotion of justice, rather than the earning of fees, is the goal of the profession.' " *Ohralik v. Ohio State Bar Association*, 436 U.S. 447, 460 (1978) (quoting Comment, *A Critical Analysis of Rules Against Solicitation by Lawyers*, 25 U.Chi.L.Rev. 674 (1958)). That seems less certain than it was even five years ago.

This Court's recognition that "a commercialization of the legal profession . . . might threaten the moral and ethical fabric of the administration of justice," *Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar*, 377 U.S. 1, 6 (1964), had best be considered for an "unexpected and undesired" trend is well underway. In the midst of it, there is an almost wistful quality to the words of the President of the ABA when he writes: "We must not permit the practice of law to become just another business." Preserving Professionalism at 864.[84]

Conference of the District of Columbia Circuit, 89 F.R.D. 169, 234 (1980) (remarks by the late Robert J. Kutak, Esq., Chairman, ABA Commission on Evaluation of Professional Standards).

[83] Glasser & Glasser, *Deep, Not Silent: Currents of Change*, Legal Times, June 13, 1983, at 2, 18 (emphasis in original). The other trends are captioned: *"Glut of lawyers nationwide . . . Pell-mell expansionism leading to the first truly national law firms . . . Astronomical growth in fees . . . Costs pressures . . . More competition for clients and new business . . . Rise of the influence of corporate counsel . . . New prominence of women in the profession . . . Changing ethnicity of law firms . . . Fascination of popular and trade press with lawyers." Id.* (emphasis in original).

[84] *Cf. Goldfarb v. Virginia State Bar*, 421 U.S. at 788 n.17 ("[i]t would be unrealistic to view the practice of professions as interchangeable with other business activities").

Just another bureaucracy would be worse. The increase in employment by governments with their civil service categories and the similar stratification of private employment through collective bargaining and personnel management have led to the bureaucratization of much of the nation's workforce.

"The bureaucrat as hero is new to America, [yet] older, conventional dreams of glory do linger on—the lawyer brilliantly turning the tables in cross examination . . . ." W. Whyte, Jr., The Organization Man 76 (1956).[85]

Those "older, conventional dreams" are fast dying.

Bureaucratization is rapidly taking hold of the legal profession.[86] Even the judiciary has not escaped it.[87]

Independence is soon to be replaced by the drive for collective security. On the authority of *Goldfarb*, the NLRB exercised jurisdiction over law firms for the first time.[88]

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[85] Historically, "[w]hat has . . . been observed most frequently is that lawyers highly value independence in their employment situations. This is reflected in dislike of supervision and of formally defined hierarchical structures." O. Maru, Research on the Legal Profession 44 (1972). The preservation of a lawyer's autonomy was central to the historic animosity to the practice of law in corporate form. Canons of Professional Ethics, Canon 35 (1928), *reprinted in* ABA, Opinions of the Comm. on Professional Ethics 156 (1967).

[86] *See, e.g.*, Brown, *Emerging Changes in the Practice of Law*, 4 Utah L.Rev. 599, 608 (1978) ("We must come to recognize that law office administration is a function worthy of the highest partnership recognition.").

[87] Kester, *The Law Clerk Explosion*, Litigation, Spring 1983, at 20.

[88] *See, e.g., Kleinberg, Kaplan, Wolff, Cohen & Burrows, P.C.*, 253 N.L.R.B. 450 (1980); *Stroock & Stroock & Lavan*, 253 N.L.R.B. 447 (1980); *Foley, Hoag & Eliot*, 229 N.L.R.B. 456 (1977). Four years before *Foley*, the NLRB explained that the "probability that a stoppage of business resulting from labor strife in . . . any . . . law firm would substantially affect commerce is not . . . sufficiently great to warrant our asserting jurisdiction over law firms." *Bodle, Fogel, Julber, Reinhardt & Rothschild*, 206 N.L.R.B. 512, 513

The NLRB now assumes that associates in law firms comprise appropriate bargaining units. *See Wayne County Neighborhood Legal Services, Inc.*, 229 N.L.R.B. 1023, 1023 (1977).

It is easy to foresee the "decline of a general professional community, a decline with potentially major implications for the lawyer-client relationship." Schwartz, *Reorganization of the Legal Profession* at 1278.[89] The "very structure of bureaucracy is a powerful force in the direction of low professional autonomy and, correspondingly, of client depersonalization." *Id.* at 1288.[90]

One answer may be the "independence" that law firms guarantee their lawyers. Because of this "autonomy,"

(1973). Its view was buttressed by "substantial countervailing practical considerations." *Id.* "A law firm, in short, is not itself engaged in the production, distribution, or sale of goods in commerce." *Id.* Prior to *Goldfarb*, the NLRB had been impressed by the fact that:

> The lawyer-client relationship is a peculiarly delicate and confidential one, and employees of lawyers must of necessity come into possession of knowledge and information of a peculiarly confidential nature. We are given pause by the arguments advanced to us in this case . . . that potential conflicts of interest are likely to develop if employees of law firms are to be represented by, and owe a substantial loyalty to, an organization which may well have interests conflicting with those of clients whom the lawyers represent.

Id. at 513-14.

[89] *Cf.* Preserving Professionalism at 864:

> It may not be possible to return to the days when the lawyer's representation was more personalized. But if we are to retain our status as a respected profession, the essential role of the lawyer as adviser, counselor, teacher, and friend must not change. To preserve this role will require vigilance and discipline.

[90] The negative aspects of bureaucratization do not stop with its impact on individual clients. Another social cost may parallel, but extend more broadly than, this impact. One of the necessary elements in the definition of a profession is a spirit of service. The separation of the bar into large aggregates of

clients receive "the best" from their attorneys. "If professional people lose this independence, then it may be predicted that the client in real need is lost, for it is the autonomy of the professional person which sets the stage for his creativity . . . ." E. Smigel, The Wall Street Lawyer 354 (1969).

VI. THE INTENTION OF CONGRESS: WHAT CONGRESS CONSIDERED AND DECIDED

A. Legislative History

A glance at the substantive sections of the statute shows that Congress considered:

1. "partnerships" and designated them an "employer," 42 U.S.C. § 2000e(a), (b);

2. "memberships" and covered them if they were in "a labor organization," *id.* § 2000e-2(c);

3. "compensation, terms, conditions, or privileges" and limited them by the words "of employment," *id.* § 2000e-2(a)(1); and

4. "employment opportunities" and limited them by the words "or otherwise adversely affect his status as an employee." *Id.* § 2000e-2(a)(2).

Faced with the language of the statute, the EEOC searched through thousands of pages of legislative history to find a scintilla of support for the congressional intention it imagines.[91] It found none. Instead, the EEOC

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producing units—the large public and private law firms—may adversely affect that spirit.

Reorganization of the Legal Profession at 1289 (footnote omitted).

[91] The New York Times pointed out that the time and words devoted to the civil rights bill was "staggering": six committees, sitting for 81 days, heard 269 witnesses; printed transcripts of those hearings cover 5791 pages, eight volumes weighing 13¼ pounds. The House filled 477 pages of the Congressional Record with debate lasting 73 hours and 41 minutes during nine days, January 31-February 10, 1964; the Senate (through June 20, 1964) filled 2890 pages with debate lasting 736 hours and 10 minutes. *History of Bill: A Year of Words*, N.Y. Times, June 20, 1964, at 10, col. 6.

found an analogy, termed it a "comparison," and called it "strong evidence that Congress intended Title VII to apply . . . to decisions comparable to a law firm's selection of partners from among its associates." EEOC Brief at 14-15 (footnote omitted).

The "strong evidence" upon which the Government relies is a single sentence which reads: "The employment needs in practically every professional and technical field are expected to rise substantially—teachers, doctors, lawyers, scientists and engineers." H.R. Rep. No. 914 (Pt. 2), 88th Cong., 1st Sess. 30 (1963) (separate views of Rep. McCulloch and others). The part of this report in which this sentence appears contains no reference to partners or partnerships, or even to women. *Id.*[92]

Leaving 1964, the EEOC flips the pages of legislative history to 1972. There it relies upon remarks of Senator Williams and Senator Javits,[93] floor managers for the comprehensive amendments to Title VII. Opposing an amendment that would have exempted the *employment* of physicians by hospitals, Senators Williams and Javits, according to the EEOC Brief, "directly confronted the

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[92] There is a reference to law firms in part 1 of the House report that is not cited in the EEOC Brief. Opponents of the bill warned that "[w]hat the courts interpret tomorrow may be altogether different from what a majority of the Members of Congress intended," H.R. Rep. No. 914, 88th Cong., 1st Sess. 112 (1963), and courts may permit the EEOC to

> assert plenary jurisdiction over . . . every restaurant, hotel, gas station, manufacturer, bank, law firm, hospital, small loan company, barber shop, funeral parlor, beauty salon, night club, and other local retail service, trade, and professional establishment . . . . Again, we must say that if the interstate commerce clause can be broadened and deepened to this extent, then the concept of *intrastate* commerce is obsolete.

Id. at 108-09 (separate minority views of Representatives Richard H. Poff and William C. Cramer) (emphasis in original).

[93] Senator Javits wrote *Discrimination—USA* (1960). In its 300 pages there is not a mention of partnerships or invitations to partnership, let alone law partnerships or relevant mentions of lawyers.

issues that arise in applying Title VII to decisions as sensitive as the decision whether to admit an associate to partnership in a law firm." EEOC Brief at 16.[94]

But the two Senators did not obliquely approach, let alone confront, even the "employment" of lawyers at law firms. They did not mention lawyers; they spoke of doctors instead. They did not discuss law partnerships; they spoke of hospitals instead. EEOC Brief at 17-19 (quoting 118 Cong.Rec. 3800-02 (1972) (Statements of Senators Williams and Javits)).

The Senators' silence regarding law firms was not mere inadvertence caused by a lack of familiarity. Both Senators, like the vast majority of their colleagues, were lawyers.

Sixty-six members of the Senate which passed Title VII were lawyers.[95] All 15 members of the Senate Committee on the Judiciary which considered an earlier version of the bill were lawyers; one committee member was an associate employed by a law partnership. Three were of counsel to law partnerships.[96] In the House of Representatives, 245 members were lawyers.[97] All 35 members of the House Committee on the Judiciary which considered the bill were lawyers. Nineteen were affiliated with law firms and at least 11 were partners.[98]

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[94] The only other authority cited in the EEOC Brief is the nonexistence of an express exemption for partners as employees, EEOC Brief at 14-16, and the inclusion of educational institutions within Title VII, which, of course, occurred only after extensive debate. EEOC Brief at 16-17.

[95] 20 Cong. Q. Almanac 34 (1964).

[96] Cong. Directory, 88th Cong., 2d Sess. (1964) (biographies and committee membership); Martindale-Hubbell Law Directory (1964) (law firm affiliation). Three of the committee members were not listed in Martindale-Hubbell.

[97] 20 Cong. Q. Almanac 34 (1964).

[98] Cong. Directory, 88th Cong., 2d Sess. (1964) (biographies and committee membership); Martindale-Hubbell Law Directory (1964) (law firm affiliation). Four of the committee members were not listed in Martindale-Hubbell and the nature of the firm affiliation was not listed for eight others.

In March of 1972, 66 senators were lawyers.[99] Of the 17 members of the Senate Committee on Labor and Public Welfare, which considered the amendments to Title VII, 11 were lawyers and the Chairman was a partner in a law firm.[100] Two hundred thirty-three members of the House were lawyers.[101] Of the 38 members of the House Committee on Education and Labor which considered the amendments, 19 were lawyers, of whom one was of counsel to a law partnership and two were in law firms which carried their names.[102]

The Speaker of the House of Representatives, John W. McCormick, had been a partner in the Boston law firm of McCormick & Hardy.[103] The Chairman of the House

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[99] When the 92d Congress began, 65 of the 100 Senators were lawyers. Cong. Q. Weekly Rpt. 129 (Jan. 15, 1971). Two Senators were replaced by March 1972. 118 Cong.Rec., Index at 3-4 (Jan. 18-Oct. 18, 1972). The two newcomers were lawyers and only one of those departing was a lawyer. *See* Biographical Directory of the American Congress, Vol. 1774-1971; Cong. Staff Directory, 92d Cong., 2d Sess. (1972).

[100] Cong. Staff Directory, 92d Cong., 2d Sess. (1972) (profession and committee membership); Martindale-Hubbell Law Directory (1972) (law firm affiliation). Four of the committee members who were lawyers were not listed in Martindale-Hubbell.

[101] When the 92d Congress began, 236 of the 434 members were lawyers. Cong. Q. Weekly Rpt. 129 (Jan. 15, 1971). Seven of those members were no longer in the House by March 1972, and five of them had been replaced. 118 Cong.Rec., Index at 5-8 (Jan. 18-Oct. 18, 1972). Four of those departing, but only one of the newcomers, were lawyers. *See* Biographical Directory of the American Congress, Vol. 1774-1971; Cong. Staff Directory, 92d Cong., 2d Sess. (1972).

[102] Cong. Staff Directory, 92d Cong., 2d Sess. (1972) (biographies and committee membership); Martindale-Hubbell Law Directory (1972) (law firm affiliation). Six of the committee members who were lawyers were not listed in Martindale-Hubbell.

[103] Cong. Directory, 88th Cong., 2d Sess. at 72-73 (1964); II Martindale-Hubbell Law Directory at 840 (1972); II Martindale-Hubbell Law Directory at 1571 (1964); I Martindale-Hubbell Law Directory at 1040 (1931).

Committee on the Judiciary, Emanuel Celler, was also the Celler of the New York City law partnership, Weisman, Celler, Allan, Spett & Sheinberg.[104] The ranking minority member of that committee, William M. McCulloch, was the McCulloch of the Piqua, Ohio law partnership, McCulloch, Felger, Fite and Gutman.[105]

Senate Minority Leader Everett McKinley Dirksen, whose support was essential for passage of the Act,[106] was also counsel to the Peoria, Illinois law partnership, Davis, Morgan & Witherell.[107] Senator Harrison A. Williams, Jr., the Williams of the Elizabeth, New Jersey law partnership, Pollis, Williams, Pappas & Dillon,[108] was a prominent supporter of the bill, as was Senator Jacob K. Javits, the former partner in and then counsel to New York City's Trubin, Sillcocks, Edelman & Knapp.[109]

Because a majority of the members of Congress were lawyers, their silence cannot be construed as reflecting an intention to include invitations to law partnership within the scope of Title VII. Instead, Congress regarded law partners "as so clearly outside the Act that no specific exclusionary provision was thought necessary." *NLRB v. Bell Aerospace Co.*, 416 U.S. at 283 (discussing exclusion of managers from the NLRA).

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[104] Cong. Directory, 88th Cong., 2d Sess. at 109 (1964); III Martindale-Hubbell Law Directory at 511 (1972); III Martindale-Hubbell Law Directory at 2326 (1964).

[105] Cong. Directory, 88th Cong., 2d Sess. at 131 (1964); V Martindale-Hubbell Law Directory at 433B-34B (1983); III Martindale-Hubbell Law Directory at 2862B (1972); III Martindale-Hubbell Law Directory at 5340 (1964).

[106] "Senator Dirksen supplied the required magic, as Democratic leaders are quick to affirm." Lewis, *Strategy of Closure*, N.Y. Times, June 11, 1964, at 21, col. 5.

[107] Cong. Directory, 88th Cong., 2d Sess. at 42 (1964); I Martindale-Hubbell Law Directory at 2228 (1964).

[108] Cong. Staff Directory, 92d Cong., 2d Sess. at 64 (1972); III Martindale-Hubbell Law Directory at 375B-76B (1973).

[109] Cong. Staff Directory, 92d Cong., 2d Sess. at 68 (1972); IV Martindale-Hubbell Law Directory at 1824B-25B (1983).

In *Ferri v. Ackerman*, 444 U.S. 193, this Court considered the intention of the 1964 Congress—the Congress and the Committees that were simultaneously considering Title VII—regarding the independence of lawyers appointed under the Criminal Justice Act of 1964, 18 U.S.C. § 3006A. A unanimous Court found that "Congress clearly wanted appointed counsel *to share* as much of *retained counsel's characteristic independence from the Government* as was possible." *Ferri v. Ackerman*, 444 U.S. at 199 n.16 (emphasis added). The Court said that "[a]n indispensable element of the effective performance of . . . [a lawyer's] responsibilities is the ability to act independently of the Government and to oppose it in adversary litigation." *Id.* at 204.

As Morris B. Abram, Esq., has written, "[T]he construction of Title VII urged by plaintiff would have amazed the legislators who voted for it." Defendant's Reply Brief at 11, *Lucido v. Cravath, Swaine & Moore*, 425 F.Supp. 123 (S.D.N.Y. 1977).

In 1964, less than one month prior to passage of the Act, Senator Norris Cotton, then the Cotton of the Lebanon, New Hampshire, law partnership, Cotton, Tessreau, Stebbins and Johnson,[119] sought to exclude from Title VII employers with fewer than 100 employees. Clearly understanding that invitations to become partners were not covered by the bill, he used a comparison: "when a small businessman . . . *selects an employee*, he comes very close to *selecting a partner*." 110 Cong. Rec. 13,085 (1964) (emphasis added). If both "select[ing] an employee" and "selecting a partner" had been included in the bill, the Senator's remarks would have been meaningless. He underscored this by continuing: "when a businessman selects a partner, he comes dangerously close to the situation he faces when he selects a wife. A small business . . . stands or falls . . . on

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[119] Cong. Directory, 88th Cong., 2d Sess. at 94 (1964); III Martindale-Hubbell Law Directory at 98 (1972); II Martindale-Hubbell Law Directory at 3967 (1964).

the congeniality and skill and ability of the man or *the partners who own* it *and the persons who work for them* . . . ." *Id.* (emphasis added).

In 1972, when the Senate debated the comprehensive amendment of Title VII, Senator Cotton returned to the same theme: "In the firms employing 25 persons, or even 30, . . . when they *select an employee*, it is very much like *selecting a partner*." 118 Cong.Rec. 2391 (1972) (emphasis added).[111]

Treating a "partner" in a law firm as an "employee" for purposes of Title VII would "obliterate the line between" employers and employees.[112] Arguments marshalled by Petitioner mirror those rejected by the Court in *Bell Aerospace Co.* Just as the dissent there argued that the NLRA was "very plain on its face" and contained only "narrow precisely defined" exceptions, *NLRB v. Bell Aerospace Co.*, 416 U.S. at 297 (White, J., dissenting), the Petitioner here maintains that Title VII must be liberally construed and that "no [partnership] exemptions should be implied." Petitioner's Brief at 26. And just as the dissent there argued that the Court's reading of the NLRA deprived "hundreds of thousands" of workers of its benefits, *NLRB v. Bell Aerospace Co.*, 416 U.S. at 307 n.3 (White, J., dissenting) (citation omitted), the Petitioner here raises the specter of thousands of lawyers without the protection of Title VII. Petitioner's Brief at 15-18.

The dissent in *Bell Aerospace Co.* also argued that the exclusion of "managerial employees" was inconsistent with the NLRA's inclusion of "professional employees." *NLRB v. Bell Aerospace Co.*, 416 U.S. at 297-98 (White,

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[111] Five days earlier, Senator Cotton had stated: "When . . . the proprietor or the organization operating [a small] business selects an employee, that is an intensely personal relationship. It is almost like selecting a partner." 118 Cong.Rec. 1524 (1972).

[112] *Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 494 (1947) (Douglas, J., dissenting).

J., dissenting). In rejecting this contention, the Court pointed out that, unlike "managerial employees," "professional employees" had not been "defined in terms of their authority 'to formulate, determine and effectuate management policies.'" *Id.* at 294 n.13 (citation omitted).

Similarly, the EEOC suggests that the refusal to include partnership opportunities within the scope of Title VII would be inconsistent with Congress' rejection of the amendment that would have excluded a doctor's professional employment at a hospital from the scope of the statute. *See* EEOC Brief at 17-19. But "professionals," unlike "partners," are not defined in terms of ownership interests. *See* Webster's New International Dictionary of the English Language 1976 (2d ed. 1944).[113]

B. Prior Judicial Rulings

Stymied by the language of Title VII, the 1964 Congress, the 1972 Congress, and the Eleventh and Seventh Circuits,[114] Petitioner seeks refuge in this Court's decisions and stresses that "[t]his Court has stated that 'it is not only appropriate but also realistic to presume that Congress was thoroughly familiar with the[] unusually important precedents from this and other federal courts and that it expected its enactment to be interpreted in conformity with them.'" Petitioner's Brief at 30 (quoting *Cannon v. University of Chicago*, 441 U.S. 677, 699 (1979) (citation omitted)). Petitioner might have added that Congress "is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it reenacts a statute without change." *Lorillard v. Pons*, 434 U.S. at 580; *see Cannon v. University of Chicago*, 441 U.S. 677, 696-97 (1979); *Al-*

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[113] *Cf. NLRB v. Yeshiva University*, 444 U.S. 672 (1980) (faculty members exempt from NLRA coverage because their interests and those of the university were aligned).

[114] *Hishon v. King & Spalding*, 678 F.2d 1022; *Burke v. Friedman*, 556 F.2d 867 (7th Cir. 1977).

bemarle Paper Co. v. Moody, 422 U.S. 405, 414 n.8 (1975).[115]

Congress was familiar with this Court's interpretation of "commerce." Congress, many of whose members were members of home-town law firms, knew that this Court had "implied [that] the practice of a learned profession is not 'trade or commerce,'" *Goldfarb v. Virginia State Bar*, 421 U.S. at 786 n.15 (citations omitted), and in *Federal Base Ball Club, Inc. v. National League*, 259 U.S. 200, 209 (1922), had stated: "a firm . . . sending out a member to argue a case . . . does not engage in . . . commerce because the lawyer goes to another State." Congress did not know in 1972 when it amended Title VII that in 1975 *Goldfarb* would hold that a restraint on local legal services may affect commerce. Neither did the NLRB. *Bodle, Fogel, Julber, Reinhardt & Rothschild*, 206 N.L.R.B. 512, 513 (1973) (law firm "not itself engaged in . . . commerce"), *overruled*, *Foley, Hoag & Eliot*, 229 N.L.R.B. 456 (1977) (relying on *Goldfarb*).

To find a congressional intention to broadly interpret the words "employee" and "employment" in Title VII "in the same manner as it had used them in the National Labor Relations Act, the Social Security Act, and the Fair Labor Standards Act," Petitioner urges:

> Congress was undoubtedly aware . . . that this Court had interpreted the term 'employment' in each of these statutes very broadly by looking at the economic reality of a particular relationship, and had rejected attempts to narrow the coverage of those Acts through the use of more restrictive common law definitions of an 'employee.'

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[115] In 1972 Congress extended the coverage of Title VII to certain government and other previously excluded employees and employers. Equal Employment Opportunity Act of 1972, Pub.L.No. 92-261, §§ 2(1), (5), 86 Stat. 103 (1972). Neither partners nor would-be partners were added to Title VII's coverage. *See id.*

Petitioner's Brief at 28-29 (citing *NLRB v. Hearst Publications*, 322 U.S. 111 (1944); *United States v. Silk*, 331 U.S. 704 (1947); and *Goldberg v. Whitaker House Cooperative, Inc.*, 366 U.S. 28 (1961)).

What "Congress was undoubtedly aware" of was that after this Court in *Hearst Publications* upheld the NLRB's determination that certain newsboys were employees rather than independent contractors, Congress reversed the Court and "repudiated" *Hearst Publications* by specifically excluding " 'any individual having the status of an independent contractor' " from the definition of employee. *Allied Chemical & Alkali Workers Local Union No. 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 166, 167 (1971).[116]

On Petitioner's own terms, this post-*Hearst Publications* congressional action makes clear that, just as with

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[116] The House Report explained:

> *"An 'employee,' according to all standard dictionaries, according to the law as the courts have stated it, and according to the understanding of almost everyone, * * * means someone who works for another for hire.* But in the case of National Labor Relations Board v. Hearst Publications, Inc.[,] . . . holding the merchants to be 'employees' of the publisher of the papers was most far reaching. It must be presumed that when Congress passed the Labor Act, *it intended words it used to have the meanings that they had when Congress passed the act, not new meanings that, 9 years later, the Labor Board might think up.* In the law, there always has been a difference, and a big difference, between 'employees' and 'independent contractors.' *'Employees' work for wages or salaries under direct supervision.* * * * It is inconceivable that Congress, when it passed the act, authorized the Board to give to every word in the act whatever meaning it wished. On the contrary, Congress intended then, and it intends now, that the Board give to words not far-fetched meanings but ordinary meanings."

Allied Chemical & Alkali Workers Local Union No. 1 v. Pittsburgh Plate Glass Co., 404 U.S. at 167 (quoting H.R. Rep. No. 245, 80th Cong., 1st Sess. 18 (1947) (emphasis added and by the Court)); *see also id.* at 166, 168 (although in "doubtful cases resort must

the term "employer,"[117] Congress intended that "employee" have its ordinary meaning. *Id.* at 168.

The history of *United States v. Silk*, 331 U.S. 704 (1947), which involved independent contractor coverage under the Social Security Act, was described in *United States v. W. M. Webb, Inc.*, 397 U.S. 179, 182-88 (1970). *Silk* "stressed many of the factors that had been important in common-law determinations of employee status," but "also contained language that could be read to detach the question of statutory coverage from the common-law tests." *Id.* at 184-85.

After *Silk* and a similar decision in *Bartels v. Birmingham*, 332 U.S. 126 (1947), "the executive agencies set about replacing their original regulation, which had defined the employment relation in terms of the incidents of employment at common law, with a new regulation that would embody the test of 'economic reality.'" *United States v. W. M. Webb, Inc.*, 397 U.S. at 185 (footnote omitted). The new regulation did not take effect because an "undoubtedly aware" Congress in 1948 resolved the matter by amending the Internal Revenue Code and the Social Security Act to exclude from the definition of employee "any individual (except an officer of a corporation) who is not an employee under . . . common-law rules." H.R.J.Res. 296, 62 Stat. 438 (1948).

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still be had to economic and policy considerations," retired workers were not employees for purposes of collective bargaining because "the legislative history of § 2(3) itself indicates that the term 'employee' is not to be stretched beyond its plain meaning embracing only those who work for another for hire"); *NLRB v. United Insurance Co.*, 390 U.S. 254, 256 (1968) ("there is no doubt that we should apply the common-law agency test here in distinguishing an employee from an independent contractor").

[117] Senator Clark explained during the Senate debate that the term "employer" in Title VII was to have its "common dictionary meaning, except as expressly qualified by the act." 110 Cong.Rec. 7216 (1964).

As this Court stated in *Webb*:

> The [Senate Finance] Committee seems to have thought that the *Silk* and *Bartels* decisions had applied traditional common-law standards, despite the language in the opinions suggesting a less constrictive approach. However, noting that the Treasury Department claimed support in those decisions for its contemplated new departure, the Committee declared: "But if it be contended that the Supreme Court has invented new law for determining an 'employee' under the social-security system in these cases, then the purpose of this resolution is to reestablish the usual common-law rules, realistically applied."

United States v. W.M. Webb, Inc., 397 U.S. at 186 (citation omitted).

Knowing "that Congress was undoubtedly aware" is important, but surely the EEOC and Petitioner were "undoubtedly aware" of the EEOC's actual adoption of the Social Security Act's definition of employee. *See* text, *infra* at 58.

Neither Petitioner nor the EEOC mentioned that this Court in *Silk* actually cited with approval Treasury Regulation 90, promulgated under Title IX of the Social Security Act, Art. 205. It states:

> "Individuals performing services as independent contractors are not employees. *Generally, . . . lawyers . . . and others who follow an independent . . . profession, in which they offer their services to the public, are independent contractors and not employees.*" 26 C.F.R. § 400.205. See also Treasury Regulation 91, 26 C.F.R. § 401.3.

United States v. Silk, 331 U.S. at 714-15 n.8 (emphasis added).

Petitioner's third case, *Goldberg v. Whitaker House Cooperative, Inc.*, 366 U.S. 28 (1961), involved members of an incorporated cooperative who were paid for homework on a piece-rate basis fixed by the cooperative. This Court held that they were employees for purposes of the

Fair Labor Standards Act.[118] Relying on the legislative history, this Court wrote that "we would be remiss, in light of this history, if we construed the Act loosely so as to permit this homework to be done in ways not permissible under the Regulations." *Id.* at 31.[119]

Petitioner contends that *Goldberg* demonstrates that "there is nothing inherently inconsistent between the coexistence of a proprietary and an employment relationship." Petitioner's Brief at 39 (emphasis omitted). In *Goldberg*, this Court stated, "If members of a trade union bought stock in their *corporate* employer, they would not cease to be employees within the conception of this Act. For the *corporation would* "suffer or *permit*" *them to work* whether or not they owned one share of stock or none or many." *Goldberg v. Whitaker House Cooperative, Inc.*, 366 U.S. at 32 (emphasis added). The Court treated the "cooperative" relationship as though it were the kind of transparency that would occur if law firms unethically termed "associates" "partners." *See* text, *infra* at 60. The members of the cooperative in *Goldberg* were

> not self-employed; nor . . . independent . . . . Apart from formal differences, they are engaged in the same work they would be doing whatever the outlet for their products. . . . [T]he management can expel them for substandard work or for failure to obey the regulations. . . . Apart from the other considerations we have mentioned, these powers make the de-

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[118] A person became a member of the cooperative by paying three dollars and agreeing to the articles and bylaws. Each member had one vote; the certificates were nontransferable; and a person could only have one membership. Members were not responsible for the cooperative's debts. No interest or dividends were paid except in the manner and amount provided in the bylaws. *Goldberg v. Whitaker House Cooperative, Inc.*, 366 U.S. at 29-30.

[119] The statute authorized the Administrator "to make 'such regulations . . . as are . . . appropriate to prevent the circumvention or evasion of and to safeguard the minimum wage rate prescribed in this Act.'" *Goldberg v. Whitaker House Cooperative, Inc.*, 366 U.S. at 30.

> vice of the cooperative too transparent to survive the statutory definition of 'employ' and the Regulations governing homework.

Goldberg v. Whitaker House Cooperative, Inc., 366 U.S. at 32-33.

There has not been a whisper about a transparent device in this case.

C. EEOC Interpretations

Amici agree with Petitioner that an interpretation by the EEOC should be given " 'deference.' " [120] Petition for a Writ of Certiorari at 21 (Dec. 3, 1982) (citation omitted). They seem to believe that amicus curiae positions are interpretations.[121] None of them, however, has provided the Court with the actual interpretations that do exist. They follow.[122]

1. *EEOC Definition for Reporting Purposes*

Since 1966, the EEOC has interpreted Title VII to exclude partners from the definition of "employee" for the

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[120] *See, e.g.*, Illinois and New York Women's Brief at 6, 14 (citation omitted).

[121] Petitioner so stated in the Petition for En Banc Consideration, at 6 n.2, *Hishon v. King & Spalding*, 678 F.2d 1022 (Mar. 23, 1982). But, as the Second Circuit has pointed out,

> an *amicus curiae* is no more a witness than any other advocate. . . . We cannot accept the [Commodity Futures Trading] Commission's current litigating position as an "interpretation" by the Commission . . . .

Ames v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 567 F.2d 1174, 1177 n.3 (2d Cir. 1977) (citing *Davies Warehouse Co. v. Bowles*, 321 U.S. 144, 156 (1944)).

[122] *See Nashville Gas Co. v. Satty*, 434 U.S. 136, 142 n.4 (1977) ("[L]ongstanding administrative construction is entitled to great weight, particularly when, as here, Congress has revisited the Act and left the practice untouched. Such a history of administrative construction may add a gloss or qualification to what is on its face unqualified statutory language."); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 417-18 (1945) (bulletin issued *contemporaneously* with regulation and first quarterly report to Congress accorded considerable weight in interpreting the regulation).

purpose of reporting the racial, ethnic, and sexual makeup of an employer's workforce as is required by the Act. For sixteen years, the EEOC has said that an employee is "any individual on the payroll of an employer who is an employee for purposes of the employer's withholding of Social Security taxes." EEOC Standard Form 100 Instruction Booklet at 3, *reprinted in* 1 Empl.Prac. Guide (CCH) ¶ 1881, at 1320 (1981).[123] Additionally, where Title VII's definition of "employee" seemed to vary from the word's definition for Social Security purposes, the EEOC specifically aligned its definition with that of the Internal Revenue Code.[124]

In 1978, the EEOC proposed an "economic realities" definition of "employee," 43 Fed.Reg. 32,280, 32,282 (1978), to "eliminat[e] the [gap] in the present definition while retaining Social Security taxes as a firm guideline in most instances for determining the existence of an employment relationship." *Id.* at 32,282-83.[125] The proposed definition was not implemented.

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[123] The Social Security Act's definition of "employee," 42 U.S.C. § 410(j), provides that an employee is "any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee." *Accord* 26 U.S.C. § 3121(d)-1(c)(1) (Federal Insurance Contributions Act).

To be a partner, an individual must be a partner in fact and not merely by label. S.S.T. 239, 1937-2 C.B. 402; *see also* Rev.Rul. 69-184, 1969-1 C.B. 256 (emphasis added), which provides: "*Bona fide members of a partnership are not employees of the partnership* . . . . Remuneration received by a partner . . . is not "wages" with respect to "employment" . . . [and] is not subject to Federal income tax withholding." The Social Security Administration regulations agree: employee means common-law employee. 20 C.F.R. § 404.1005(b) (1982).

[124] *See* EEOC Standard Form 100 Instruction Booklet at 3, *reprinted in* 1 Empl.Prac. Guide (CCH) ¶ 1881, at 1320.

[125] As support for this "expanded definition of employees," 43 Fed.Reg. at 32,281, the EEOC cited *Mathis v. Standard Brands Chemical Industries*, 10 Fair Empl.Prac.Cas (BNA) 295 (N.D.Ga. 1975). The *Mathis* court stated:

2. *General Counsel Opinions*

Soon after Title VII became effective, the EEOC's General Counsel issued an "interpretation" reported in the Digest of Legal Interpretations Issued or Adopted by the Commission, October 9, 1965 through December 31, 1965, § I(B)(6), at 2-3 (digest of General Counsel Opinion of Oct. 11, 1965):

> A law firm having the requisite number of employees as prescribed in section 701 is an "employer" within the meaning of the Act. However, partners of the firm may not be "employees" within the meaning of Title VII.

Later, in its first year of existence, the EEOC limited the exclusion of "partners" from the term "employees" by restricting it to actual partners:

> [T]he determination of whether partners of the [law] firm are "employees" within the meaning of Title VII must be determined on a case-by-case basis.

EEOC, First Annual Digest of Legal Interpretations, July 1965-July 1966, § I(B)(5), at 6 (subsequent digest of General Counsel Opinion of Oct. 11, 1965).[128] The "determination . . . [to be made] on a case-by-case basis" was again clarified in a 1966 EEOC General Counsel opinion letter:

> Employment must be distinguished from the independent contractual associations of business entities for the latter are not covered by Title VII. While it would be a desirable goal to eliminate racial discrimination in all business enterprises, it does not appear that Congress intended such a broad objective for Title VII. The emphasis on the word "employment" in the legislative history supports such a conclusion.

Id. at 297. The court expressly rejected the EEOC's amicus position that an employment relationship was not needed: under it "all contractual relationships between businessmen would logically be subject to the Act's coverage." *Id.* at 297 n.1.

[128] This EEOC General Counsel interpretation is available only in the form of these two digests. The EEOC has represented to counsel that it is unable to locate a copy.

> As to the treatment of junior partners of a law firm, we have not as yet had occasion to pass on a particular fact situation, but we incline to the view that the *term "partner"* is not decisive if their perquisites and tenure are more consistent with the status of employee than of co-owner of the enterprise.[127]

1 Empl.Prac. Guide (CCH) ¶ 17,304.18 (1966) (emphasis added).

These interpretations contemplated "sham" but ostensible partnership arrangements into which lawyers may not enter.[128] *Cf. EEOC v. Rinella & Rinella*, 401 F.Supp. 175, 179-81 (N.D.Ill. 1975) (rejecting argument that "associates" were "independent contractors" rather than "employees"). An example is an arrangement where "no partnership relation in fact exists, . . . the senior member of the group receiv[ing] the income and pay[ing] the other members fixed salaries as . . . employees." ABA Comm. on Professional Ethics and Grievances, Formal Op. 106 (1934); *see also id.* 277 (1948); *id.* 126 (1935); *id.* 115 (1934).

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[127] In *Lucido*, when defendant Cravath, Swaine & Moore referred to the EEOC General Counsel's October 11, 1965 interpretation that "partners of the firm may not be 'employees' within the meaning of Title VII," the EEOC stated: "All such opinions were withdrawn. *Cf.* Federal Register, Vol. 35, p. 18692 (Dec. 9, 1970). . . . [*T*]*he question is not yet settled.*" Brief of EEOC as Amicus Curiae at 5 n.2, *Lucido v. Cravath, Swaine & Moore*, 425 F.Supp. 123 (S.D.N.Y. 1977) (emphasis in original and added).

In the cited *Federal Register*, the EEOC merely stated that 42 U.S.C. § 2000e-12(b) applies only to addressees of General Counsel opinion letters. 35 Fed.Reg. 18,692 (1970). Additionally, this Court has relied on the EEOC's early digested legal interpretations of Title VII. *See Nashville Gas Co. v. Satty*, 434 U.S. 136, 142 n.4 (1977).

[128] It is unethical for lawyers to represent that they are partners "unless they are *in fact* partners." Model Code of Professional Responsibility DR 2-102(C) (1980) (emphasis added); *see also id.* EC 2-13 n.21.

3. *Other EEOC Interpretations*

Prior to the filing of *Burke v. Friedman*, 556 F.2d 867 (7th Cir. 1977), the EEOC dismissed a charge against four Friedman accounting firm partners "for want of subject matter jurisdiction on the grounds that defendants employed fewer than fifteen employees." *Id.* at 868. The Friedman partners employed thirteen nonpartners. In conformity with its own interpretations, the EEOC held that it was without jurisdiction because partners were not employees. *Id.* The district court and the Court of Appeals for the Seventh Circuit agreed. *Id.* at 869, 870.[129]

In 1980, citing *Burke*, the EEOC held that "trustees are not employees of the trust, rather they are employers who manage and control the business of the trust fund."[130] EEOC, Commission Decision No. 80-23 (Aug. 27, 1980), *reprinted in* 2 Empl.Prac. Guide (CCH) ¶ 6813, at 4923-24 (May 1982).

In 1981, the acting General Counsel apparently had lawyers and law partnerships on her mind when she filed an amicus curiae brief which explained *Burke* to the Ninth Circuit in a case involving physicians: "[T]he law [sic] partners were . . . 'employers who own and manage the operations of the business.' . . . *The [Burke] court logically reasoned that partners could not be both employer and employee.*" Brief of the Equal Employment

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[129] In an Age Discrimination in Employment Act case, the court cited to its decision in *Burke* for the principle that "a partner is not an employee." *Zimmerman v. North American Signal Co.*, 704 F.2d 347, 352 (7th Cir. 1983); *cf. EEOC v. Rinella & Rinella*, 401 F.Supp. at 181 ("Since the firm is not a partnership, and the associates are not listed as 'of counsel,' it is only reasonable to conclude that they are employed by the firm.").

[130] Congress considered "trusts" and termed them "employers" in 42 U.S.C. § 2000e(b), the same statutory provision that terms "partnerships" "employers." *Cf.* EEOC, Commission Decision No. 75-273 (June 9, 1975) (board of directors held not employees), *reprinted in* 11 Fair Empl.Prac.Cas. (BNA) 1485 (1976).

Opportunity Commission as *Amicus Curiae* at 20 n.15, *Gomez v. Alexian Brothers*, 698 F.2d 1019 (9th Cir. 1983) (citation omitted) (emphasis added).

The EEOC's amicus curiae position in this Court is that "[w]hether partners are themselves employees is immaterial." EEOC Brief at 6.

D. Partnership Is Neither an Employment Opportunity Nor a Term, Condition, or Privilege of Employment

Petitioner asserts that the "opportunity of *promotion* to partnership" was an " 'employment opportunity' " and a " 'term, condition or privilege of employment.' " Petitioner's Brief at 42 (emphasis added). "[T]he *Hishon* court has probably taken the correct approach to Title VII [in rejecting this argument]. There is no particular indication that Title VII was intended to cover decisions as to whom one will voluntarily associate with in a *true* business partnership." 1 A. Larson, Employment Discrimination § 5.23, at 2-20 (1983) (emphasis in original). Given the absence of an " 'affirmative intention' " by Congress to adopt Petitioner's stance—indeed, given that it intended to exclude partnership decisions from Title VII—Petitioner's "theory" must be rejected because "jurisdiction here would give rise to serious constitutional questions." *NLRB v. Catholic Bishop*, 440 U.S. at 501.

The EEOC's reliance upon Title VII cases involving retirement benefits and health or disability insurance is misplaced. " '[T]erms [or] conditions . . . of employment,' as used in Title VII, include 'fringe benefits' such as pension rights and retirement and disability benefits, all of which are now well recognized as 'integrally related to the entire wage structure.' " [131]

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[131] *Gilbert v. General Electric Co.*, 519 F.2d 661, 663 (4th Cir. 1975), *rev'd on other grounds*, 429 U.S. 125, 128 (1976) ("As part of its total compensation package, General Electric provides non-occupational sickness and accident benefits to all employees . . . ."); *see* 29 C.F.R. § 1604.9(a) (1982) (" 'Fringe benefits,' as used

Petitioner's reliance upon NLRB cases begs the issue.[132] NLRB principles only "guide, but do not bind, courts in tailoring remedies under Title VII." *Ford Motor Co. v. EEOC*, 102 S.Ct. 3057, 3063 n.8 (1982). "[P]rinciples developed for use in the industrial setting cannot be 'imposed blindly' " on the legal profession. *NLRB v. Yeshiva University*, 444 U.S. 672, 681 (1980) (citation omitted); *cf. Goldfarb v. Virginia State Bar*, 421 U.S. at 788 n.17 ("unrealistic to view the practice of professions as interchangeable with other business activities").

Central to the NLRA is the protection of the organizational and collective bargaining rights of non-supervisory

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herein, includes medical, hospital, accident, life insurance and retirement benefits; profit-sharing and bonus plans; leave; and other terms, conditions, and privileges of employment."); *see also Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 51 U.S.L.W. 4837, 4840 (U.S. June 20, 1983) ("Health insurance and other fringe benefits are 'compensation, terms, conditions or privileges of employment.' ").

[132] The NLRB cases also are factually inapposite. In *NLRB v. Bell Aircraft Corp.*, 206 F.2d 235 (2d Cir. 1953), the employer wanted to promote the employee to a supervisory position. It delayed the promotion until the union's charge regarding the employee's participation in a strike was resolved. "[T]he union disposed of all the charges against the employees who had returned to work before the termination of the strike; and, on being so notified, the employer promoted [the employee] to the assistant foreman position, *which had been held open for him.*" *Id.* at 238 (emphasis added).

Petitioner's characterization of *Golden State Bottling Co. v. NLRB*, 414 U.S. 168 (1973), as involving "an employee [who] was denied promotion to a supervisory position which was outside the coverage of the NLRA because of his union activities" is inaccurate. *See* Petitioner's Brief at 43. In *Golden State*, a driver-salesman, after being unlawfully discharged, was the beneficiary of an NLRB order that he be reinstated with backpay. *Golden State Bottling Co. v. NLRB*, 414 U.S. at 170 n.1. At the time of his discharge he was the company's "leading driver-salesman." *Id.* at 187. Before complying with the command of the NLRB, "Golden State began converting its top driver-salesmen to distributors, or independent contractors," *id.*, and subsequently sold its bottling business to All American Beverages, Inc. Because All American knew of the pre-existing order at the time of its pur-

employees. *See* 29 U.S.C. § 161. To protect them, the NLRA focuses on the reaction by supervisory employees to the activities of protected employees. To do this, the NLRA must have an artificial definition of "employee," so it excludes "any individual *employed* as a supervisor." 29 U.S.C. § 152(3) (emphasis added). The opportunity for promotion of which NLRA cases speak is only an opportunity for promotion to another position *as an employee*.[133]

Election to partnership is not a promotion. It is a change in status from employee to employer-owner—a change of kind, not degree.[134] Petitioner and amici illustrate this by stuttering when they describe what happened. To Petitioner, there was a denial of "promotion," and Petitioner develops an entire "partnerships are corporations" argument to prove it. Petitioner's Brief at 31-41. Indeed, Petitioner's theory is premised upon the

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chase, the NLRB held that All American was subject to its prior order. If "Golden State [had] already reinstated [the employee] with backpay before the sale of its business, and thereby fully complied with the Board's order, All American would have had no more obligation to employ him in the continuing business than it had to employ any of Golden State's other employees." *Id.* at 189 n.10.

[133] The EEOC inaccurately cites *Allied Chemical & Alkali Workers Local Union No. 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, for the proposition that "the comparable phrase 'terms and conditions of employment' in the National Labor Relations Act . . . includes *everything* that is 'an aspect of the relationship between the employer and employees.'" EEOC Brief at 8-9 (emphasis added). In *Allied Chemical*, the Court merely determined that the Act is *limited* to "issues that settle an aspect of the relationship between the employer and employees," *Allied Chemical & Alkali Workers Local Union No. 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. at 178, not that it *includes* "everything that is an aspect of the relationship."

[134] *Cf. NLRB v. Yeshiva University*, 444 U.S. at 682-83, 688 (citation omitted) ("faculty's professional interests . . . cannot be separated from those of the institution"; although "professional employees" expressly included in NLRA, faculty was "'clearly outside the act'" despite lack of "'specific exclusionary provision'").

"opportunity of *promotion* to partnership." *Id.* at 42 (emphasis added).

The EEOC, however, studiously avoids the word: "promotion" or "promoted" appears but thrice in the EEOC Brief and even then only in quotations attributable to Petitioner. EEOC Brief at 2, 3. To the EEOC, it seems that Petitioner has been denied "advancement," *id.* at 4, 5, 6, 9, 11, 12, and was not "elevat[ed]." *Id.* at 10. To the other amici, for example, Petitioner has been denied "admission," ADL Brief at 3; California Women's Brief at 8; and "progression." AAUW Brief at 40.

Congress shut the front door when it excluded partners from Title VII's definition of "employee." The Eleventh Circuit slammed the "backdoor" by "declin[ing] to extend the meaning of 'employment opportunities' beyond its intended context." *Hishon v. King & Spalding*, 678 F.2d at 1028.

E. Congress Did Not Intend to Repeal the Law of Partnership

In 1964 and 1972, a partnership, whether formed under the Uniform Partnership Act or the common law, had one overriding central characteristic. It was a "voluntary association based on contract." J. Crane & A. Bromberg, Law of Partnership § 5, at 38 (1968) (Law of Partnership). "X cannot become Y's partner without Y's so intending any more than he can without intending it himself." *Id.* at 43.

Petitioner tries to conjure this away by turning partnerships into corporations. To do this, Petitioner places primary reliance upon *Bellis v. United States*, 417 U.S. 85 (1974), and the fact that King & Spalding has a written partnership agreement to declare that law partnerships are corporations.[135] *Bellis* involved a grand jury

[135] The existence of a written partnership agreement is the result of lawyers practicing what they preach. Of course it is in writing. As the ABA's advertisement for its *Model Partnership Agreement for the Small Law Firm* states, "Without a partnership agreement, any law firm risks needless misunderstandings, discord, and potential dissolution." **Barrister, Spring 1983, at 40 (advertisement).**

subpoena for partnership records held "in a representative capacity." *Id.* at 97 (footnote omitted). For fifth amendment (self-incrimination) purposes, it was "the organizational character of the records and the representative aspect of" Bellis' possession of them that was important. *Id.* at 99.

"Of course, state [including Georgia] and federal law do not treat partnerships as distinct entities for all purposes," *id.* at 97 n.7, and it is "impossib[le to] mak[e] the duties arising from the relationship of master and servant applicable to a partnership and the partners composing it." *United States Fidelity & Guaranty Co. v. Neal*, 188 Ga. 105, 112, 3 S.E.2d 80, 84 (1939).[136] Petitioner does quote at length the portion of the late Judge Newell Edenfield's opinion which compares law partnerships to marriage. Petitioner's Brief at 6. That is the analogy used in basic texts.

> Except for marriage, it is hard to think of a voluntary legal relationship that is more intimate or complex, in human terms, than the normal partnership whose members work constantly together. This (along with business difficulties and ease of dissolu-

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[136] Because the employer-employee relationship "suggests . . . a contract . . . between two persons having a separate . . . existence in the eyes of the law," a partner "and the partnership can not be considered as separate and distinct," *United States Fidelity & Guaranty Co. v. Neal*, 188 Ga. at 110, 111, 3 S.E. 2d at 83; *see also Lester Witte & Co. v. Rabun County*, 245 Ga. 382, 265 S.E.2d 4 (1980), so a partner cannot be an employee of the partnership and has no coverage under Georgia's worker's compensation law. *United States Fidelity & Guaranty Co. v. Neal*, 188 Ga. 105, 3 SE.2d 80; *Scoggins v. Aetna Casualty & Surety Co.*, 139 Ga.App. 805, 229 S.E.2d 683 (1976). Also, "under the [Uniform Partnership Act], whatever may be the case as to third persons, as between themselves the partners are not to be regarded as an entity." Law of Partnership § 54(d) at 315 n.32. "[T]he prevailing view [is that] the relation between parties associated in a business cannot be both partnership and employer-employee." *Id* § 16, at 86 n.99; *see also id.* § 3(c) at 24 (a partner is "an employer, which precludes his being an employee").

tion) contributes to the high divorce rate in partnerships as in marriage.

Law of Partnership at 1 n.1.[137]

Petitioner asks this Court to repeal the common law, the statutes of Georgia drawn from it,[138] Georgia's decisional law,[139] and the partnership law of the other 49

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[137] *See* Wallace, *Are You Meant to be a Partner?*, Barrister, Fall 1981, at 12, 12 ("Having a partner is worse than marriage!"); *see also* 15 Steps to Partnership at 61 (emphasis in original):

> In a large law firm survey, 61 percent of the respondents rated *personality* as an above-average consideration [in evaluating associates for partnership]. The remainder of the respondents indicated it to be of average importance vis-a-vis other considerations. Not one firm replied that it gives little consideration to personality. Law firms are like families; one argumentative, difficult, temperamental or egotistic person can throw the entire group into chaos. Law is a demanding profession and most lawyers do not want their time taken up by conflict.

[138] Georgia's statute requires "[t]he strictest good faith" in partners' dealings with one another. O.C.G.A. § 14-8-40 (1982). Partners, but not employees, are entitled to: "examine into the affairs of the firm," *id.* § 14-8-41; "have joint possession of [the firm's] effects," *id.*; "collect and apply [the firm's] assets," *id.*; "contract or otherwise bind the firm in matters connected with its business," *id.*; "equally . . . share the profits," *id.* § 14-8-45; if insolvent, have contribution from the solvent partners "to pay the amount of the pro rata liability of the insolvent partner for debts of the firm," *id.* § 14-8-46; bind "[a]ll the partners" by an act "within the legitimate scope of the business of the partnership," *id.* § 14-8-61; make "[a]ll the partners . . . responsible to innocent third persons" by committing "fraud . . . in matters within the scope of the business of the partnership," *id.* § 14-8-65; and make "[a]ll partners . . . liable for . . . torts . . . [if] committed by the partner within the legitimate scope of the business of the partnership." *Id.* § 14-8-66(a).

[139] Except for an equitable action for an accounting, *see Johnson v. Towsend*, 192 Ga. 522, 15 S.E.2d 790 (1941); *Miller & Son v. Freeman*, 111 Ga. 654, 36 S.E. 961 (1900), a partner surrenders the right to sue a partner, *United States Fidelity & Guaranty Co. v. Neal*, 188 Ga. 105, 3 S.E.2d 80, acts as a principal and as a

states and to ignore the "intimate or complex" relationship Crane and Bromberg describe.[140]

VII. ALTERNATIVE MEANS ARE AVAILABLE TO ENSURE AGAINST DISCRIMINATION IN THE LEGAL PROFESSION

The legal profession has not been indifferent to the increasing number of women within its ranks. Rather, it took action "to encourage more women to enter and realize their full potential within the legal profession." [141] ABA, Summary of Action of the House of Delegates at 31-32 (Aug. 1972). In 1973, these principles were incorporated into the ABA, Standards for the Approval of Law Schools, Standard 211 (1973), *reprinted in* ABA, Approval of Law Schools at 6-7 (1979).[142]

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general agent, *Gilmore v. Hammock*, 72 Ga.App. 35, 32 S.E.2d 844 (1945), makes statements or admissions, *Ward-Truitt Co. v. Nicholson*, 23 Ga.App. 672, 99 S.E. 153 (1919), or accepts payments, *Brady v. J. E. Phillips Mule Co.*, 27 Ga.App. 444, 108 S.E. 809 (1921), and binds the partnership and even a client, even if the client has dealt solely with another partner. *Lancaster v. Neal*, 41 Ga.App. 721, 154 S.E. 386 (1930). A partner can withdraw to dissolve a partnership and join to create a new one. *Harwell v. Cowan*, 175 Ga. 33, 165 S.E. 19 (1932); *see Stone v. First Nat'l Bank*, 117 Ga.App. 802, 162 S.E.2d 217 (1968).

[140] For federal tax purposes, there are four relevant "corporate characteristics:" (1) free transferability of interests; (2) limited liability; (3) centralization of management; and (4) continuity of life. Treas. Regs. § 301.7701-2(b)-(e), T.D. 7515. King & Spalding possesses none of them. The district court, to which the firm's complete partnership agreement was submitted, wrote, "[A]nyone denying that King & Spalding is a partnership would be laughed out of any court in Georgia, as well as the Internal Revenue Service." *Hishon v. King & Spalding*, 24 Fair Empl.Prac.Cas. (BNA) 1303, 1304 (N.D.Ga. 1980).

[141] At its earlier midyear meeting, the ABA "strongly condemn[ed] all forms of discriminatory hiring practices within the legal profession, whether on the basis of sex, religion, race, or national origin." ABA, Reports of the American Bar Association 154 (1972).

[142] *See* ABA, Summary of Action of the House of Delegates at 27-28 (Aug. 1981) (adding Standard 211(b) prohibiting admission

If occasional problems occur, there are purely private alternative remedies which do not intrude upon the unique status and role of attorneys. The court of appeals suggested that if "representations were deceptively made, then perhaps an action in breach of contract or misrepresentation may provide a more appropriate vehicle for the appellant to drive toward a legal remedy." *Hishon v. King & Spalding*, 678 F.2d at 1029. Additionally, an action under 42 U.S.C. §§ 1981 and 1982 may be available to members of racial groups who seek to enter into partnership contracts.[143]

Courts, including this one, have the power to address the issue under their rulemaking[144] and administrative

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policies precluding a diverse student body and Standard 211(d) regarding law school admission and employment policies directly relating to school's religious affiliation and purpose; redesignating Standard 211(b) as 211(c) and Standard 211(c) as 211(e)); *see also* ABA, Summary of Action of the House of Delegates at 25 (Aug. 1982) (revising Standard 211(d)).

[143] *See Johnson v. Railway Express Agency*, 421 U.S. 454, 459-60 (1975); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 436 (1968).

[144] All federal courts have statutory authority to "prescribe rules for the conduct of their business." 28 U.S.C. § 2071; *see* Fed.R. Civ.P. 83 ("Each district court . . . may . . . make . . . rules governing its practice . . . . In all cases not provided for by rule, the district courts may regulate their practice in any manner not inconsistent with these rules."); *cf.* Sup.Ct.R. 5.4 ("Each applicant shall take the following oath or affirmation: I, ————, do solemnly swear (or affirm) that as an attorney and as a counselor of this Court I will conduct myself uprightly and according to law, and that I will support the Constitution of the United States.").

In addition, the Chief Justice has authority to submit certain issues to the Judicial Conference of the United States. *See* 28 U.S.C. § 331 ("the Conference shall make a comprehensive survey of the condition of business in the courts of the United States"); *cf.* Archer, *Blackballed!*, Barrister, Spring 1983, at 23, 24 ("on March 14, 1982, the Judicial Conference of the United States endorsed the principle that it is inappropriate for a judge to hold membership in any organization that practices invidious discrimination").

powers.[145] *See Ballard v. United States*, 329 U.S. 187, 193 (1946) (Court exercised its "power of supervision over the administration of justice" to include women in jury panels); *McNabb v. United States*, 318 U.S. 332, 340 (1943) ("Judicial supervision of the administration of criminal justice . . . implies the duty of establishing and maintaining civilized standards of procedure and evidence."). As this Court wrote in *Theard v. United States*, 354 U.S. 278, 281 (1957) (quoting *People ex rel. Karlin v. Culkin*, 248 N.Y. 465, 470-71, 162 N.E. 487, 489 (1928) (Cardozo, C.J.)):

> The two judicial systems of courts, the state judicatures and the federal judiciary, have autonomous control over the conduct of their officers, among whom, in the present context, lawyers are included. The court's control over a lawyer's professional life derives from his relation to the responsibilities of a court. . . . "'Membership in the bar is a privilege burdened with conditions.' . . . The appellant was received into that ancient fellowship for something more than private gain. He became an officer of the court, and, like the court itself, an instrument or agency to advance the ends of justice."

VIII. THE WRIT OF CERTIORARI SHOULD BE DISMISSED AS IMPROVIDENTLY GRANTED

Petitioner's charge was filed on November 19, 1979, J.A. 56, 542 days after King & Spalding decided not to invite Petitioner to become a partner. J.A. 10; J.A. 47-48; *see Hishon v. King & Spalding*, 678 F.2d at 1024. Because the record conclusively shows that Petitioner failed to comply with Title VII's 180-day limitation,[146]

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[145] *See also, e.g., In re Brose*, 51 U.S.L.W. 3898 (U.S. June 20, 1983) (Burger, C.J., dissenting).

[146] Petitioner's up-or-out claim is not properly before this Court. Petitioner's Complaint neither mentioned nor alleged discrimination under King & Spalding's up-or-out rule. *See* J.A. 12. Petitioner's first mention of the rule was in a brief filed on June 23, 1980, seeking to compel discovery from King & Spalding on the

Petitioner may not litigate this "test case." [147]

The only unlawful acts alleged by Petitioner, other than denial of partnership, are the freezing of her pay and her termination as a result of the operation of the up-or-out rule. But Petitioner admits that these were but the "direct consequence of King & Spalding's decision to refuse to admit Ms. Hishon to partnership." Petitioner's Brief at 47; *id.* at 15 (the refusal to elect Petitioner to partnership "resulted automatically in the termination of her employment"); *see Hishon v. King & Spalding*, 678 F.2d at 1030 (emphasis in original) (Tjoflat, J., dissenting) ("*direct* consequence of this decision . . . was to deny Hishon membership and to terminate her employment"). Thus, the termination and pay freeze were nothing other than the "delayed, but inevitable, consequence[s] of the denial of" partnership. *Delaware State College v. Ricks*, 449 U.S. 250, 257-58 (1980).

Although the Complaint never mentioned King & Spalding's up-or-out rule,[148] its existence and operation

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up-or-out rule. J.A. 165. King & Spalding opposed this discovery on the ground "that this information is only relevant to the *merits* of her underlying claim." J.A. 247 (emphasis in original).

Petitioner admitted as much, having stated:

> Plaintiff is plainly entitled to discovery as to the factual details of defendant's "up or out policy" for the purpose of demonstrating *how* that policy was applied and, thus, supporting her contention that termination of her employment was caused by defendant's decision to refuse to admit her to partnership on the basis of sex, and, therefore, constitutes unlawful employment discrimination covered by Title VII.

J.A. 214 (emphasis in original).

[147] Petitioner's Brief at 23 ("Although not by design, this case has become a test case of the rights not only of women, but also of blacks, Jews and other minorities . . . .").

[148] *See* J.A. 11 ("The actions of defendant . . . terminating plaintiff's employment constituted unlawful acts of discrimination against plaintiff because of her sex . . . ."); J.A. 12 ("these unlawful actions of sex discrimination by defendant against plaintiff

are not in dispute. King & Spalding has such a rule, but there is no allegation that it was applied to Petitioner differently than it was applied to others. *See* J.A. 31-32, 48, 165.[149]

As the district court found, "Neither in her pleading, briefs nor arguments does plaintiff even whisper or suggest that such applications [of the up-or-out rule] by defendant were in any way based on sex." *Hishon v. King & Spalding*, 24 Fair Empl.Prac.Cas. (BNA) at 1306 n.1.

To paraphrase the Court in *Ricks*:

> In order for [Petitioner to prevail, she] would have had to allege and prove that the manner in which [her] employment was terminated differed discriminatorily from the manner in which [King & Spalding] terminated other [associates] who also had been denied [partnership]. But no suggestion has been made that [Petitioner] was treated differently from other unsuccessful [partnership] aspirants. . . .
>
> In sum, the only alleged discrimination occurred . . . at the time the [partnership] decision was made and communicated to [Petitioner]. That is so even though [two] of the *effects* of the denial of [partnership]—the eventual loss of [employment and no further raises]—did not occur until later.

Delaware State College v. Ricks, 449 U.S. at 258 (emphasis in original); *accord, Chardon v. Fernandez*, 454

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have been accomplished by the following . . . circumstances: . . . (c) Defendant discharged plaintiff as its employee effective December 31, 1979.").

[149] Petitioner suggested limits on discovery.

> If King & Spalding were to prevail on this threshhold question, discovery on the merits aimed at establishing that it has in fact discriminated against women and other minorities in its employment, promotion and compensation decisions, as well as discovery into matters of partner compensation for the purpose of establishing damages under Title VII, would be moot.

J.A. 82.

The district court agreed. J.A. 82. Later, Petitioner declined the district court's offer of a hearing on the motion to dismiss.

U.S. 6, 8 (1981) ("[T]he proper focus is on the time of the *discriminatory act*, not the point at which the *consequences* of the act become painful. The fact of termination is not itself an illegal act.") (citation omitted) (emphasis in original).

Although Petitioner requested King & Spalding to reconsider its decision in January 1979,[150] the 180-day limitation period commenced to run when the original decision was made in May 1978. "The grievance procedure [like Petitioner's request for reconsideration], by its nature, is a *remedy* for a prior decision, not an opportunity to *influence* that decision before it is made." *Delaware State College v. Ricks*, 449 U.S. at 261 (emphasis in original). The Court added: "We do not suggest that aspirants . . . should ignore available opportunities to request reconsideration. Mere requests to reconsider, however, cannot extend the limitations period applicable to the civil rights laws." *Id.* at 261 n.1.

IX. PETITIONER'S ALLEGATION UNDER THE UP-OR-OUT RULE IS NOT ACTIONABLE

The record is devoid of any facts or allegations tending to show that King & Spalding's up-or-out rule[151] was applied differently to Petitioner than to similarly situated males.[152] Petitioner seeks to dismiss this by stating

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[150] Petition for En Banc Consideration at 2-3, *Hishon v. King & Spalding*, 678 F.2d 1022.

[151] In a recent "LawPoll" conducted for the *American Bar Association Journal*, it was found that of the firms surveyed that had ten or more attorneys, 44 percent expected associates who did not make partner to find other employment whereas 23 percent responded that they retained the associates. 69 A.B.A.J. 1026 (1983).

[152] Nor can Petitioner claim that further discovery is needed on the up-or-out rule. Petitioner proposed the limitation on discovery, J.A. 82, and Petitioner's entire statement advising the Eleventh Circuit of the facts follows:

> ***The facts necessary to determine the legal issue in this case are not disputed.*** As stated by the majority:
>
> "In 1972, Elizabeth Hishon accepted a position as an associate with King & Spalding. King & Spalding is a large At-

> [t]hat some white male associates at King & Spalding have also been forced to leave the firm when they did not make partner under the firm's 'up-or-out' policy is beside the point. Petitioner's male contemporaries did not lose their jobs as associates of King & Spalding because they were males, but for other reasons not covered by Title VII.

Petitioner's Brief at 48.

Petitioner's argument is precisely the same as that rejected by this Court in *Delaware State College v. Ricks*, 449 U.S. 250. *Ricks* holds that it is the unlawful act and not the "delayed, but inevitable consequence" of the unlawful act that is actionable. *Id.* at 257-58; *accord Chardon v. Fernandez*, 454 U.S. at 8.

The only actionable act alleged by Petitioner is the partnership decision in May 1978. Because of King & Spalding's up-or-out policy, the "delayed, but inevitable consequence" of not inviting Petitioner to become a part-

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lanta law firm which operates as a general partnership. The partnership consists of approximately fifty active lawyers and employs approximately fifty additional lawyers as associates. At the time the plaintiff became an associate with the firm, consideration for partnership occurred at the end of an associate's sixth year. The firm also maintained an "up or out" policy. Under the policy, if the partnership did not invite an associate to become a partner after the requisite time, the associate was allowed to remain with the firm only for such reasonable period as necessary to secure other employment.

"In May 1978, the partnership considered Ms. Hishon, along with other associates hired at the same time, and decided not to invite her to join the partnership. She was promptly notified, and was extended the normal period of time to secure other employment. Eight months later, Ms. Hishon requested reconsideration for partnership. At the conclusion of the May 1979 partnership meeting, the result was the same—Ms. Hishon was not invited into the partnership. Again the partnership notified her of the outcome. Ms. Hishon left the firm on December 31, 1979."

Petition for En Banc Consideration at 2-3, *Hishon v. King & Spalding*, 678 F.2d 1022 (emphasis added) (quoting *id.* at 1024).

ner was that Petitioner be required to leave the firm after "such reasonable period as necessary to secure other employment." *Hishon v. King & Spalding*, 678 F.2d at 1024.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of the court of appeals or dismiss the writ of certiorari as improvidently granted.

Respectfully submitted,

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